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HUMAN RIGHTS AS THE UNWRITTEN CONSTITUTION: THE PROBLEM OF CHANGE AND STABILITY IN CONSTITUTIONAL INTERPRETATION*

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We are, I believe, in the midst of a major jurisprudential paradigm shift from the legal realist—legal positivist paradigm of the legal official as a managerial technocrat ideally seeking the utilitarian goal of the greatest happiness of the greatest number, to a natural law paradigm of rights. This paradigm shift, most dramatically apparent in legal philosophy in the work of Ronald Dworkin,[1] has not yet been fully and fairly articulated; therefore, we cannot be certain of the final form the paradigm will take or of the extent of its influence on thought about and the practice of law. I believe the paradigm to be of quite general significance throughout all areas of the law, but want here to address its relevance to constitutional law in particular where its importance in enabling us to rethink constitutional law in a more profound way is already being felt. The jurisprudence of rights directly challenges the existing state of constitutional theory and practice in the United States. It sharply repudiates the concessive majoritarianism of James B. Thayer's classic article,[2] the value skepticism of Learned Hand,[3] the jaundiced historicism of Alexander Bickel's later writings,[4] and Herbert Wechsler's appeal to the apolitical and amoral ultimacy of neutral principles.[5] In its place, the jurisprudence of rights takes seriously the fundamental normative concepts of human rights, in terms of which the founders' thought and the Constitution was designed, in a way in which later constitutional theory, based on utilitarian legal realist premises, does not and cannot. This rethinking of constitutional law, in a jurisprudential mode much closer in spirit to the

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

2. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893).

3. L. HAND, THE BILL OF RIGHTS (1958).

4. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); THE MORALITY OF CONSENT (1975). These later works contrast sharply with Bickel's important earlier work, THE LEAST DANGEROUS BRANCH (1962).

5. Wechsler, *Toward Netural Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

political morality of the founders, has been made possible by the most serious and profound attack on utilitarianism since Kant, John Rawls' *A Theory of Justice*,[6] and the gradual introduction of these neo-Kantian, deontological, anti-utilitarian ideas into legal theory through the work of Dworkin and others.[7] In this paper, I would like to sketch some of the ways in which the jurisprudence of rights enables us better to understand the historic and contemporary mission of constitutional law in the United States.[8]

Let us begin with some clear thought about the objectives of a constitutional theory, so that we may set ourselves and judge our performance in terms of some determinate criteria of theoretical adequacy. The tasks of constitutional theory appear, as is often the case in legal theory, to be both explanatory and normative, concerned with both understanding and recommendations for change. These tasks are, at a minimum: first, some explanation for the historic forms of constitutional doctrine; second, articulation of a critical normative viewpoint in terms of which historic and contemporary forms of constitutional doctrine may be assessed; and third, some account for both the stabilities and changes in constitutional law. In this paper, I shall focus on how the jurisprudence of rights enables us to clarify the problem of stability and change in constitutional interpretation. I begin with the deployment of the distinction introduced by Rawls,[9] and used in constitutional theory by Dworkin,[10] between concepts and conceptions, suggesting how the philosophical analysis of the concept of human rights enables us to understand the way in which human rights have been articulated in general, and enforced as constitutional rights in particular. Then, I will try to show how this view meets the criteria of theoretical adequacy set earlier, in particular, clarifying the problem of stability and change in one focal area of new constitutional rights, privacy. Finally, we turn to some methodological points regarding this novel form of constitutional theorizing.

I. THE CONCEPT OF HUMAN RIGHTS

Let us begin with the concept of human rights, which recent deontological moral theory has enabled us to defend articulately against the familiar Benthamite criticisms.[11] Recent moral theories of human

6. J. RAWLS, A THEORY OF JUSTICE (1971).

7. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW (1978); C. FRIED, RIGHT AND WRONG (1978).

8. *See generally* D.A.J. RICHARDS, THE MORAL CRITICISM OF THE LAW (1977).

9. *See* J. RAWLS, *supra* note 6, at 5-6.

10. *See* R. DWORKIN, *supra* note 1, at 134-35.

11. *See* J. Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution,* in 2 WORKS OF JEREMY BENTHAM 488 (J. Bowring ed. 1838-1843).

rights, inspired by Rawls, focus on the explication of the concept in terms of two features: the capacities of personhood, sometimes called autonomy, and equality.[12]

First, as regards personhood, the idea of human rights appears importantly to rest on the idea of persons as bearers of rights in virtue of certain capacities for taking critical attitudes toward living their lives. Persons, in contrast to other kinds of creatures, adopt various forms of critical attitudes towards their own lives (for example, regret or shame, or, on the other hand, self-respect or pride), and can, within limits, change their lives accordingly.

Second, as regards equality, the idea of human rights expresses a normative point of view which puts an equal weight on each person's capacity for autonomy. Recent moral theory alternatively articulates the idea of equality in one of three ways: (i) equal concern and respect,[13] (ii) universalizability,[14] and (iii) equal parties to the social contract.[15] These three alternative approaches are intended, I believe, to articulate the same underlying concept: that the basic principles of political right must treat all persons as equals.

The notion of treating persons as equals is, of course, ambiguous. A fundamental way to distinguish among moral theories is to focus on how they differently resolve this ambiguity. For example, Bentham, the great utilitarian,[16] argued that utilitarianism importantly treated people as equals in the sense that everyone's pleasures and pains were impartially registered by the utilitarian calculus; thus, utilitarianism treated everyone as an equal, where the criterion of equality is pleasure and pain. From the perspective of the jurisprudence of rights, utilitarianism fails to treat persons as equals in the morally significant sense, for, focusing obsessively on aggregated pleasure as the only ethically significant goal, utilitarianism flatly ignores that the only ethically significant fact is that *persons* experience pleasure, and that pleasure has moral and human significance only in the context of the life that a person chooses to lead.[17] Utilitarianism, thus, fails to treat persons as equals in that it sacrifices moral personality to utilitarian ag-

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12. For an elaboration of these themes, see Richards, *Rights and Autonomy: A Prolegomenon to the Theory of Rights,* to be published in HARV. C.R. - C.L. L. REV.

13. *See* R. DWORKIN, *supra* note 1.

14. *See* A. GEWIRTH, REASON AND MORALITY (1978).

15. *See* J. RAWLS, *supra* note 6; D.A.J. RICHARDS, A THEORY OF REASONS FOR ACTION (1971).

16. *See generally* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1948).

17. Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, UTILITARIANISM (1973).

gregates. In contrast, the jurisprudence of rights defines treating persons as equals not in terms of pleasure or pain (or talent, or whatever), but in terms of personhood, the capacity of each person self-critically to evaluate and give order and personal integrity to the form of one's life. It is thus no accident that from Kant to Rawls the idea of human rights has been supposed to be not merely non-utilitarian, but anti-utilitarian, protecting the integrity of the person in leading his or her life from precisely the sacrifice of individual projects to aggregate pleasure that unqualified utilitarianism would require. Dworkin makes this point by defining rights as trumps over countervailing utilitarian calculations.[18]

The general articulation of human rights is made in terms of principles of political right which, in order to treat persons as equals in terms of their personhood, justify coercion and the like in securing for people certain kinds of choices the exercise of which assures self-critical capacity to live one's life. The catalogue of such rights is extensive, including not only the constitutional rights which are our concern here, and the correlative human rights for which international protection is justly sought, but the garden variety rights of personal security and safety at the heart of the criminal law and the civil law of torts, the rights of promising enforced under the civil law of contracts, the rights of truth telling enforced by the civil law of fraud, and the like.[19] When I said earlier that the jurisprudence of rights was of quite general significance in legal theory I had in mind the relevance of this general form of account to many areas of law outside constitutional law. In particular, there is, I believe, good reason to think, in light of George Fletcher's important recent book,[20] that the jurisprudence of rights may enable us fundamentally to rethink not only constitutional law, but criminal law as well.

II. CONCEPTIONS OF HUMAN RIGHTS AND THE CONSTITUTION

As we have just seen, not all moral or human rights are constitutional rights; other areas of the law enforce many moral rights which we do not regard as within the ambit of constitutional rights. But, the idea of a countermajoritarian Constitution, with a catalogue of rights enforced by the institution of judicial supremacy against the institutions of popular majority rule, clearly deploys the concept of human

18. *See* R. DWORKIN, *supra* note 1, at 90-94, 188-92.

19. *See* D.A.J. RICHARDS, *supra* note 15, at 92-195.

20. *See* note 7 *supra*. *See also* Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution,* to be published in U. PA. L. REV.

rights to some significant substantive extent. Indeed, the moral legitimacy of constitutionalism is most felicitously explained in terms of the idea of human rights, for the normative structure of arguments of moral rights, as trumps over countervailing utilitarian calculations, has in the American legal system an institutional correlate in terms of judicial supremacy which enforces a catalogue of human rights against majoritarian institutions which tend to be utilitarian.

But if American constitutionalism deploys the concept of human rights in significant ways, it seems likely that a moral theory which explicates this concept may in important ways clarify the historic and contemporary forms of constitutional doctrine. At this point, we must introduce into our normative constitutional vocabulary the idea of shifting or changing conceptions of a concept, here, the concept of human rights. I have argued that the concept of human rights rests on two interconnected moral ideas, autonomy and equality, which require that certain choices of persons be protected from interference by others. This concept is, of course, highly abstract and general. To the extent that the concept is deployed in the Constitution, it is the natural object of considerable controversy over how the concept is to be applied and elaborated. We may characterize such controversies as battles over conflicting conceptions of the underlying concept of human rights. Certain of these controversies, which date from the inception of the Constitution, have been resolved by later amendments, for example, the extension of personhood to Blacks by the Civil War amendments. Other controversies have been resolved by dramatic changes in judicial interpretation; for example, the conception of substantive economic due process, as an interpretation of unabridgeable human rights, yielded to the present conception of minimum scrutiny in the economic and social areas on the ground of an interpretation of underlying principles of social and economic justice not given proper weight by the earlier conception.

If moral theory may elucidate the concept of human rights deployed in various constitutional guarantees, *pari passu* it may enable us to understand and assess the competing conceptions of the underlying concept. In this way, moral theory may meet the three criteria for the adequacy of a constitutional theory that we earlier set ourselves, for the clarification of competing conceptions of constitutional rights may (i) facilitate historical reconstructions of the ways of thinking which led earlier controversialists of various competing conceptions to take the views they in fact took, (ii) afford a critical normative point of view by which we may assess the validity of these competing conceptions, and (iii) elucidate the problem of stability and change in con-

stitutional interpretation. Let me make a few brief remarks about (i) and (ii) and then turn to (iii).

A constitutional theory is richer and more explanatory to the extent that it has more historical resonances, enabling us to enter into the way of thinking of earlier controversies over constitutional doctrine. The jurisprudence of rights enables us to do so because it takes seriously ideas of human or natural rights which were part of the historical matrix of constitutionalism,[21] and enables us to understand and yet critically evaluate the forms of earlier constitutional controversy. For example, the concern of certain of the founders with property-based criteria for the franchise reflects an historically plausible view of economic independence as the *sine qua non* for political independence.[22] The jurisprudence of rights enables us to understand this conception of political rights as a not unreasonable interpretation of underlying values of autonomous self-determination, and to adopt a critical viewpoint from which to evaluate the proposed remedy for the underlying problem (deprivation of voting rights from the economically dependent, rather than less restrictive attempts to grant voting rights to all but mitigate the effects of economic vulnerability on the exercise of political power by either encouraging forms of political organization among the economically disadvantaged or by regulating the more unreasonable distortions of political power by economic power (for example, by campaign financing laws)).

III. THE UNWRITTEN CONSTITUTION, CONCEPTS AND CONCEPTIONS OF HUMAN RIGHTS, AND THE CONSTITUTIONAL RIGHT TO PRIVACY

Finally, the jurisprudence of rights appears significantly to advance the discussion of the problem of stability and change in constitutional interpretation. Constitutional guarantees are often quite general and abstract in their normative language (due process, equal protection, freedom of speech and press, etc.). Such guarantees deploy, we have argued, the normative concept of human rights; constitutional controversy in the United States often centers on debate over competing conceptions of this underlying concept. Accordingly, I believe it is analytically useful to regard the concept of human rights as the unwrit-

21. *See generally,* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); H. COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT (1977); M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978); G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

22. *See generally* R. FLATHMAN, THE PRACTICE OF RIGHTS 225-31 (1977).

ten Constitution,[23] the fundamental normative value deployed by various constitutional guarantees and the value in terms of which constitutional controversy is always conducted, either implicitly or explicitly. The unity and stability of constitutional interpretation over time (in the United States, two centuries) rest, *inter alia,* on the central importance that the concept of human rights has played in constitutional interpretation. Conceptions of the concept have, as we have noted, changed, but the normative centrality of human rights remains—the idea, at a minimum, that the moral legitimacy of state power rests on a reciprocal balance of allegiance to the state by the citizen and respect by the state of certain uncompromisable rights of the citizen.[24] The role of this underlying concept, while implicit in constitutional interpretation in general, appears dramatically and expressly in cases where constitutional rights are progressively elaborated. A notable example is the right to privacy.

The legal development of the right to privacy, first as a new right in tort law and later as a constitutional right, represents a striking example of the place of the underlying value of human rights in American elaborations of new legal rights. Consider the kind of moral argument to which Warren and Brandeis appealed when they argued that a new tort right, privacy, should be recognized.[25] In their original article, Warren and Brandeis were concerned with the narrow question of the inadequacy of existing tort remedies for unwarranted disclosure by "yellow" journalists of private facts, but they bottomed their argument on a much deeper appeal to the "general right of the individual to be let alone" deriving from the rights "of an inviolate personality".[26] When Brandeis, as a Supreme Court justice, argued that fourth amendment guarantees should be expanded to forbid forms of bugging, he drew on the same moral argument of his earlier article, speaking of "the right to be let alone—the most comprehensive of rights and the most valued by civilized men."[27] In so doing, Brandeis was, I believe, invoking the general conception of human rights, founded on autonomy and equality with reference to the general class of personal immunities from interference by private individuals and the state mandated by considerations of rights—in these

23. *Cf.* Grey, *Do We Have an Unwritten Constitution*? 27 STAN. L. REV. 703 (1975) (values not articulated in the text of the constitution are appropriately applied by the courts in constitutional litigation).

24. *See generally* B. MOORE, JR., INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1973).

25. *See* Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

26. *Id.* at 205 (footnote omitted).

27. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

cases, the deep connection between personal dignity and the right to control highly personal information about oneself, for without some legally guaranteed right to control such information, personal autonomy is degraded at its core from *personal* self-definition and self-mastery into the impersonal and fungible conventionalism which uncontrolled publicity inevitably facilitates.[28] The protection of privacy in these tort and constitutional areas represents a natural elaboration of underlying moral values in the light of modern technologies of privacy incursion which require the elaboration of new legal rights commensurate with underlying moral values.

In similar fashion, the elaboration of an independent constitutional right to privacy in *Griswold* et al. represents an implementation of underlying moral values of treating persons as equals in the light of both modern contraceptive technology and new theories of the person arising from the post-Freudian idea that one's sexual and procreative life is not the just property of the state, but one of the critical choices which, autonomously exercised, enables people to establish personal integrity in a life they can call their own. Accordingly, when Justice Douglas inferred the constitutional right to privacy in *Griswold*, he correctly appealed, like Brandeis, to the constitutional commitment to the ultimate values of human rights, the guarantee to persons of effective institutional respect for their capacities, as free and rational beings, to define the meaning of their own lives.[29] Of course, the *Griswold* right to privacy is analytically distinguishable from the informational control issues of the tort and fourth amendment concepts. The unity of these disparate rights is not in the definition of the ultimate rights, but in the common moral arguments they invoke: the concern for the exacting protection of matters not properly of public concern, in the interest of protecting the ultimate resources of personal individuation that lie at the heart of the concept of human rights. In my view, then, the critics of the constitutional right to privacy are wrong.[30] It is they, not the Court, who have lost touch with the moral vision underlying the constitutional design, the institutional protection

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28. *Cf.* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U.L. REV. 962, 1003 (1964) (invasion of privacy as a tort protects human dignity by placing sanctions on outrageous or unreasonable violations of personhood).

29. These remarks are perforce sketchy. For an elaboration, see Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights,* to be published in HASTINGS L. J [hereinafter cited as *Sexual Autonomy*]; Richards' *supra* note 20.

30. *See e.g.,* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973).

of moral personality on which this right rests. If the Court has failed consistently to extend this principle to areas which it should protect (for example, homosexuality),[31] that is a criticism not of the principle, but of the Court's incoherent and inarticulate failure courageously to vindicate it.

IV. SOME CONCLUDING METHODOLOGICAL REMARKS

I have argued that the jurisprudence of rights enables us fruitfully to rethink the mission of constitutional law in the United States, and have suggested its quite general significance to American legal theory. If the jurisprudence of rights is correct, American legal realist-pragmatist-utilitarian theory does not correspond to the practice of its greatest judges and lawyers; Holmes and Learned Hand, as legal theorists, do not explicate, indeed they fundamentally misdescribe, what they did as some of our greatest judges. Why this should be so is a question of some intellectual interest since it touches a deep schizoid nerve in the American detachment of legal theory from legal practice.[32] I cannot believe it to be a bad thing if the jurisprudence of rights enables us fruitfully to reengage American legal theory and practice.

Let me conclude with a methodological caveat. While I have emphasized the crucial role of moral theory in rethinking constitutional law, I believe it to be of equal importance that such moral theory be combined with a sound legal history and a deep social theory. Constitutional law is an historical artifact and a product of a certain kind of society. If, as lawyers concerned to understand and to change the law, we must take rights and thus moral theory seriously, we must also at the same time take seriously history and social context. If we could meet this challenge, in time, I believe, we could see law and society not in the fragmented ways of our respective intellectual specializations, but as a whole; and we could then see as a blinding truth what legal education today only dimly perceives: that the only justification for legal education as we have it today is the development of a sound legal theory which self-critically reminds the profession and legal practice in general of what they are doing, what they are doing wrong or irresponsibly, and how they might better meet the ethical obligations commensurate with their power and perquisites.

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31. *See* Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory,* 45 FORDHAM L. REV. 1281 (1977); *Sexual Autonomy, supra* note 29.

32. *See* Richards, Book Review, 24 N.Y.L.S.L. REV. 310 (1978).