



1999

## The Warren Court and the Concept of a Right

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34 Harv. C.R.-C.L. L. Rev. 7

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# The Warren Court and the Concept of a Right

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David Luban\*

The Warren Court is dead. None of its Justices remain on the bench—indeed, only Justice White survives—and the recent history of the Supreme Court has been in large part a history of repudiating controversial Warren Court doctrines. Public opinion likewise repudiates Warren-style judicial activism, and constitutional scholarship—which as recently as the mid-1980s consisted in considerable measure of theoretical defenses for Warren Court-inspired methods of interpreting the Bill of Rights—has grown increasingly skeptical of expansive interpretive strategies. It is quite possible that future constitutional historians will regard the Warren era as an aberration. The Warren Court, after all, was not just the most liberal Supreme Court in American history, but arguably the *only* liberal Supreme Court in American history.

Is there any reason, beyond a nostalgia that is by no means universally shared, to continue discussing the Warren Court? It seems that nearly everyone now agrees that judicial activism is pernicious and judicial restraint desirable. And everyone seems to believe that this opinion, if true, requires one to discard the Warren Court's jurisprudence. I will argue that these conclusions are mistaken, for the hackneyed contrast between activism and restraint misses the true significance of the Warren Court, the real reason that its jurisprudence merits continued discussion. That significance lies not in the Warren Court's transformation of the judicial role, but in its transformation of the concept of a legal right.

The problem with focusing on judicial role is this: "Judicial activism" and "judicial restraint" originated as obscure lawyers' terms for concepts that had a fairly precise meaning, or rather, a handful of fairly precise meanings. To Holmes's law partner and Brandeis's teacher James Bradley Thayer, who wrote the first major article on the subject, the doc-

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\* Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center. B.A., University of Chicago, 1970; Ph.D., Yale University, 1974. This Article was originally delivered as a public lecture at the annual Bertram Morris Colloquium at the University of Colorado. I subsequently presented the paper to the philosophy department at the University of Maryland at Baltimore County, to legal theory workshops at George Washington University and the University of Maryland, and as a Phi Beta Kappa lecture at the State University of New York at Albany. I am grateful to my hosts at these institutions, to members of my audiences for their astute comments on the talk, and to Tim Brennan, Judith Lichtenberg, Douglas MacLean, Peter Quint, Jim Nickel, Mark Tushnet, David Wasserman, and Robin West for suggestions on an earlier draft. I am especially grateful to Jonathan Bennett, whose penetrating questions caused me to recast my argument in a way that avoids what I now regard as a major error, and to Akhil Amar for conversations about the exclusionary rule.

trine of restraint meant simply that judges should defer to legislatures in close constitutional cases. Judges should invalidate legislation only when it is not merely unconstitutional but *obviously* unconstitutional.<sup>1</sup> Holmes, Brandeis, and Frankfurter adopted the substance of Thayer's understanding.<sup>2</sup> To later jurists, such as Herbert Wechsler, judicial restraint meant refraining from constitutional judgments unless they can be grounded in neutral principle.<sup>3</sup> To Alexander Bickel, as perhaps to Brandeis and Frankfurter, restraint meant avoiding constitutional decisions that the country was not yet ready to deal with politically.<sup>4</sup> For all these jurists, judicial restraint was one of the cardinal virtues in a judge.<sup>5</sup>

This latter assessment changed with the Warren Court, the quintessentially "activist" Court. The Warren Court made the vigorous and aggressive defense of civil rights and liberties a principal judicial virtue; it was the only Court that ever seemed heroic. In the course of this transformation, the Warren Court became identified not with a theory of jurisprudence but with a group of controversial decisions. These began with the segregation cases, then the free-speech-for-Communists cases. There followed the "rights of criminals" decisions, which generated the pernicious myth that the courts habitually turn criminals loose on mere technicalities; then the school prayer decisions, which in the eyes of critics drove God from the schools; and the contraception decisions, which paved the way to the Burger Court's protection of abortion in *Roe v. Wade*.<sup>6</sup>

In short, the Warren Court's history reads like a compendium of the social issues that have divided liberals from conservatives for thirty years. This fact was skillfully exploited by politicians who made the demand for judicial restraint a political issue. Of course, the politicization of this issue goes back at least to Franklin D. Roosevelt's effort to pack the Supreme Court with "restrained" justices who would uphold New Deal legislation. Moreover, national debate about judicial activism has been virtually continuous since *Brown v. Board of Education*<sup>7</sup> was decided in 1954. But the issue seems to have entered national electoral politics for the first time in President Richard Nixon's 1972 re-election campaign. Nixon's advisors recommended that he use his power of judi-

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<sup>1</sup> See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>2</sup> See Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

<sup>3</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>4</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (2d ed. 1986).

<sup>5</sup> Yet I do not believe that a coherent argument exists on behalf of judicial restraint as developed by Thayer and his successors. See David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 456-61 (1994).

<sup>6</sup> 410 U.S. 113 (1973).

<sup>7</sup> 347 U.S. 483 (1954).

cial appointments to divide Southern from Northern Democrats. A memorandum to the President from Patrick Buchanan, then one of Nixon's chief political advisors, argued that nominating a "Southern Strict Constructionist will force Democratic Northern Liberals and major candidates to anger either the South with a veto vote or the blacks and the labor movement and the northern liberals."<sup>8</sup> Nixon put this strategy to effective use in the 1972 campaign.

The Warren Court's opponents won the rhetorical battle that ensued, for nowadays even liberal jurists shrink from the label "activist." As a result, "judicial activism" has become, in the hands of the politicians, little more than a euphemism for judicial protection and promotion of reverse discrimination, crime on the streets, atheism, and sexual permissiveness while "judicial restraint" has become a rallying cry for conservative opposition to these so-called policies. Any more precise juridical or philosophical meaning has been drained from the terms.

My own focus is quite different from these political issues. If, as Oliver Wendell Holmes wrote, great cases make bad law, it is likewise true that great political controversies make bad jurisprudence, and for much the same reason "great cases are called great," according to Holmes, "not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."<sup>9</sup> In my view, the lasting achievement of the Warren Court lies neither in the legacy of decisions it left us (which have suffered and continue to suffer erosion at the hands of subsequent Courts), nor in its supposed expansion of the judicial role. It lies instead in a seemingly abstract issue of jurisprudence—the nature of a legal right. The Warren Court proceeded from a sophisticated understanding of what rights are, based on an analysis of how they must be secured. My aim is to explain and defend that understanding. If I am right, to abandon the Warren legacy is to misunderstand the very idea of legal rights.

This Article is by no means a survey of Warren Court jurisprudence. My aim is analytic, not synthetic. Instead of collecting cases to prove points, my method is to choose a small handful of decisions for philosophical elaboration—decisions that display what I take to be most characteristic of the Warren Court understanding of rights. Indeed, I focus largely on just two cases, *Mapp v. Ohio*<sup>10</sup> and *Griswold v. Connecticut*.<sup>11</sup> Even in those cases, I isolate a single strand of the argument, drawing out implications and assumptions that are implicit in the opinions them-

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<sup>8</sup> Memorandum from Patrick Buchanan to President Richard Nixon, *quoted in* JONATHAN SCHELL, *THE TIME OF ILLUSION* 184 (1975).

<sup>9</sup> *Northern Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

<sup>10</sup> 367 U.S. 643 (1961).

<sup>11</sup> 381 U.S. 479 (1965).

selves. I do not attempt to prove that the concept of rights I extract from these cases is representative of the Warren Court's jurisprudence in its full range. For one thing, there is a fallacy involved in speaking of the Warren Court as a unitary body—as, in Kenneth Shepsle's terminology, an "it" rather than a "they."<sup>12</sup> The Warren Court justices held different theories, and the opinions I will be discussing have different authors. Some justices would undoubtedly have disagreed with the conception of rights I am defending here, and they too wrote Warren Court opinions. My justification for speaking of the Warren Court's theory of rights is that despite the tensions on that Court and its decisions that do not fit the pattern I describe, I believe that there is nevertheless a distinctive theory of legal rights that makes sense of many of the Warren Court's most characteristic cases. Here, the aim is philosophical rather than historical: it is to extract, elaborate, and defend a conception of legal rights that one can fairly associate with the Warren Court. My reason for elaborating it, however, is not that I associate it with the Warren Court. My reason for elaborating it is that I believe it to be true.<sup>13</sup>

Interpreters of the Warren Court focus on different cases as paradigms of what the Court was about. For those who admire the Warren Court as a champion of human rights, *Brown v. Board of Education*<sup>14</sup> is the paradigm decision. For John Hart Ely, who understands the work of the Warren Court as the policing of the democratic process against its infirmities, the reapportionment cases concentrate the essence of the Court's activities.<sup>15</sup> For critics of the Court's invention of new rights, such as Robert Bork, Justice Douglas's strange rhetoric in *Griswold v. Connecticut* of "penumbral" rights "emanating" from constitutional provisions and then fusing to create new constitutional rights reveals the essential dishonesty of judicial activism.<sup>16</sup> In the final section of this Article, I too will concentrate on *Griswold*, the paradigm right-to-privacy case, but I begin my argument with two of the Warren Court's most controversial criminal procedure cases, *Mapp* and *Miranda v. Arizona*.<sup>17</sup>

<sup>12</sup> See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L. REV. L. & ECON. 239 (1992).

<sup>13</sup> It should be obvious from these remarks that I disagree with scholars who reject the entire concept of rights, notably writers in the Critical Legal Studies movement. In my view, to call something a right is to assert that it is a value of such great importance that it deserves especially stringent legal protection. If critics mean something different by the notion of rights, they will have to find some other word to denote a value of such great importance that it deserves rigorous legal protection. Otherwise, they must argue that *no* values are that important. The first alternative is a pointless semantic substitution; the second is a deeply implausible political belief. See DAVID LUBAN, *LEGAL MODERNISM* 76-78 (1994).

<sup>14</sup> 347 U.S. 483 (1954).

<sup>15</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 120-24 (1980). The reapportionment cases are *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>16</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 95-100 (1990).

<sup>17</sup> 384 U.S. 436 (1966).

*Mapp* imposed the exclusionary rule on states,<sup>18</sup> while *Miranda* required arresting officers to inform suspects of their constitutional right to remain silent, and to have an attorney. In both cases, the Court devised novel remedies to prevent police from violating defendants' rights. As I now argue, the Warren Court approached the concept of a right by rethinking the nature of a remedy.

## I.

The literature on rights is enormous, and philosophers have offered various definitions of a right. On all accounts, however, a right is a value of particular importance, and the protection of rights is a central aim of public institutions. Indeed, to acknowledge a value as a right is just to assert that it warrants especially stringent protection. Our rights are those background expectations we can count on, and thus, they must be not merely *protected* but *secured*. For this reason, the question of what it takes to secure rights is a central question facing any political and legal theory that includes the concept of rights in its vocabulary. On one common understanding of the question, rights are protected *reactively*: an individual whose rights have been infringed may seek satisfaction of some sort, either compensation or punishment of the infringer, after the violation has occurred.

Reactive remedies are defined by two characteristics. First, they are imposed after the wrongdoing they remedy. Second, they are imposed directly against the wrongdoer, in the sense that the wrongdoer must pay compensation, suffer punishment, or both. Let us call these two characteristics the "Ex Post Feature" and the "Directness Feature" of the remedy.

We may call a remedy that lacks the Ex Post Feature an "ex ante remedy," while one that lacks the Directness Feature is an "indirect" remedy. It is clear that a remedy can be ex ante without being indirect. For instance, an injunction imposing a prior restraint on dangerous conduct is ex ante but direct. Less obviously, a remedy may be indirect without being ex ante. For example, proposed statutes permitting suits against gun manufacturers and vendors whose wares have been used in wrongdoings are not ex ante, since the lawsuits will be filed in response to, rather than in anticipation of, gun-related injuries. Yet they are indirect, inasmuch as they aim to control harmful conduct by gun-users by sanctioning parties other than the gun-users themselves. Finally, some remedies are both indirect and ex ante. A court order to a legislature to budget funds for a new prison in order to remedy Eighth Amendment violations is ex ante, because it aims to prevent future violations rather than compensating or punishing past ones. At the same time, it is indirect, because

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<sup>18</sup> See 367 U.S. at 659.

it does not directly regulate the conduct of individuals such as prison administrators and guards who commit the violations.<sup>19</sup>

I begin my argument by observing that *Miranda* and *Mapp* illustrate (respectively) the ex ante and indirect remedial strategies. *Miranda* requires a novel set of police behaviors, *Miranda* warnings, prior to questioning a criminal suspect, in order to forestall constitutional violations in that questioning. Consequently, *Miranda* warnings amount to an ex ante remedy for such violations. By requiring *Miranda* warnings, the possibility of coerced confessions, the third degree, and grueling interrogations without an attorney is reduced *in advance*. Without such advance protection, the victim of police overreaching is given over to the tender mercies of the tort system or the police disciplinary system for redress.

By contrast, *Mapp*'s exclusionary rule provides an indirect remedy for Fourth Amendment violations in that it imposes neither punishment nor the requirement of compensation from police, but rather aims to control police conduct by indirectly changing their structure of incentives. (The remedy is not ex ante, of course, because the suppression of evidence occurs after the violation.) Prior to *Mapp*, an individual's right to be free from illegal searches by police was protected only reactively. The victim of an illegal search could seek monetary damages or internal police disciplinary action; however, the illegally seized evidence could still be used at trial. To those who share the reactive conception of rights protection, the exclusionary rule seems irrational. In Cardozo's memorable objection to the rule, "The criminal is to go free because the constable has blundered."<sup>20</sup> In the critics' view, punishing the violation by undermining the police's purpose in conducting an illegal search confuses issues that should be held distinct. Sue the constable, but don't coddle the crook.

Justice Clark's draft opinion in *Mapp* emphasized the inefficacy of reactive remedies in this context as "worthless and futile."<sup>21</sup> "How can we expect to defend 'the indefeasible right of personal security' by telling him who suffers its invasion to seek damages for 'the breaking of doors?'" Clark asked, adding that "aroused public opinion and internal police discipline" are "equally without the deterrent value."<sup>22</sup> The exclu-

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<sup>19</sup> Of course, remedies can have both ex ante and ex post aspects. An ex post remedy such as punishment aims, at least partly, at special or general deterrence. Indeed, insofar as it aims at general deterrence, it also combines direct and indirect strategies: it directly punishes one person, and thereby indirectly deters others. Thus, the distinctions between ex ante and ex post remedies, and direct and indirect remedies, are matters of degree rather than kind. Even when both aspects of the distinctions are present, however, one or the other usually predominates.

<sup>20</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

<sup>21</sup> Quoted in BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 394 (1983).

<sup>22</sup> *Id.*

sionary rule, by contrast, protects rights indirectly, not reactively, by removing the incentive for the unlawful search.

In my view, the most important feature of the Warren Court's approach to rights is its appreciation that standard, reactive remedies for rights violations are often inadequate (for reasons that I discuss below). For that reason, the Court turned again and again to what I shall term *activist* remedies, a generic term including both *ex ante* and indirect remedies.

It should be clear that I am using the term "activist" in this context quite deliberately. One of my principal contentions in this Article is that the Warren Court's judicial activism should best be understood as a heightened predilection for *ex ante* and indirect remedies in preference to reactive remedies. It is for this reason that I earlier described the contrast between judicial activism and judicial restraint as hackneyed: the more significant contrast, I believe, is not between activism and restraint but between activism and reactivism. The activism/restraint schema distinguishes between interpretive strategies; the question it implies is, "Should judges appeal to their own moral values in interpreting general constitutional language, or rest content with inferences from framers' intent, American tradition, plain language and structure, or other impersonally available legal sources?" Alternatively, the activism/restraint schema may distinguish between loosely and tightly constrained conceptions of the judicial role. On this reading the implicit question is not interpretive but moral: "Should judges ever depart from merely interpreting the law in order to achieve justice or advance national well-being?" By contrast, the activism/reactivism schema distinguishes remedial strategies, and its implicit question is neither interpretive nor moral. It asks, "Should judges secure rights through *ex ante* and indirect remedies or only through reactive remedies centered on *ex post* punishment of, or compensation by, rights violators?"

It may seem that defining activism in terms of remedial strategies is simply an exercise in conclusory labeling that illicitly ducks the interpretive and moral questions in the preceding paragraph. But the identification of activism with a set of remedial strategies does not duck the interpretive and moral questions—it answers them, and that is why it is more than a play on words. The pursuit of activist remedial strategies requires activist rather than restrained interpretive strategies, as well as an activist rather than restrained conception of the judicial role. Let us see why.

Unlike reactive remedies, both *ex ante* and indirect remedies aim to secure rights by granting additional rights (for example, to *Miranda* warnings, or to exclude evidence) that at first glance appear to go beyond the scope of the violation they aim to cure. As we shall see in greater detail below, this difference is why a predilection for activist remedies requires activist interpretive strategies, at least to the extent that these



lead judges to find unanticipated rights implicit in legal entitlements that make no mention of them. Indeed, it is precisely this feature of activist remedies that generates the accusation that the Warren Court engaged in the wholesale manufacture of rights without foundation in law.

Moreover, the use of indirect remedies, as opposed to the rote imposition of punishment or compensation, requires greater judicial ingenuity, inventiveness, and improvisation in order to rearrange incentives to discourage rights violations. The judge must determine, based on the particularities of the issue, which additional rights should be recognized in order most effectively to nip threatened primary rights violations in the bud. It is this heightened engagement of judicial discretion in granting *ex ante* and indirect remedial rights that leads to the suspicion of a judiciary that has become a law unto itself, answerable only to judicial conscience and unchained from doctrinal moorings. Hence comes the accusation of an inflated conception of the judicial role on the part of activist judges.

Shortly, I will argue that this accusation, like the accusation that the Warren Court engaged in promiscuous rights manufacture, merely begs the question of how broad the judicial role and the roster of rights are. However, even before going into that argument, let me indicate in a preliminary way why activist protections of rights have at least as good intuitive credentials as their more familiar reactive counterparts.

This point may be seen most easily by reflecting on *Mapp*. The conventional wisdom of law has always held that the purpose of a remedy is to make the victim whole—to restore, insofar as it is possible to do so, the state of affairs that would have obtained had the victim's rights not been violated. Plainly, if there had been no illegal search, the police would not have obtained the evidence—that, at any rate, is what a court must presume. This basic fact shows that the exclusionary rule, which eliminates the improperly obtained evidence, is the genuine make-whole remedy. Punishing the transgressor or obtaining the payment of damages is merely a second- or third-best surrogate. It is equally clear that if an *ex ante* remedy succeeds, the infringement of rights will not take place, and that this too is the genuine make-whole remedy. Reactive remedies, by contrast, provide only surrogates for making the victim whole. In the case of punishment, reactive remedies give the victim the satisfaction of knowing that her pain has been met by the pain inflicted on her injurer. In the case of compensation, reactive remedies award the victim a monetary substitute for a loss that may not be monetizable. Obviously, in some instances reactive remedies are the best we can do. However, the burden is plainly on the reactivist to show why we should settle for surrogate make-whole remedies when we can have the real thing. The activist's challenge may be stated in the simplest of slogans: "Accept no substitutes!"

Akhil Amar has objected that this argument proves far too much.<sup>23</sup> It proves, for example, that if the government confiscates a ton of marijuana as the result of an illegal search, it would have to make the defendant whole by returning the marijuana. If the government recovers stolen property in an illegal search, it must return the property to the thief, not the victim. And, if the police cut legal corners to find a kidnap victim, must they really turn around, cover their eyes, and count to twenty to allow the kidnapper to enjoy the status quo ante? Plainly not. Why adopt a remedy that benefits only wrongdoers—a rule such as the exclusionary rule or the hypothetical rule of returning the marijuana—merely because it is the only way to restore whatever status quo would have existed had the constitutional right not been infringed?

But I deny that the exclusionary rule is really indistinguishable from the rule of marijuana return. Giving a ton of marijuana to marijuana distributors is itself a wrongful and, indeed, a criminal act. Abetting a theft or kidnapping are also wrongful and criminal acts, whereas excluding improperly seized evidence is not. Even in cases where excluding marijuana or stolen goods from evidence leads to acquittal, the distributor and thief do not and should not get the contraband back. This is because even if the police have no right to the evidence, the distributor and thief have no right to the marijuana or stolen goods, so there is no reason to make them whole in the sense of restoring them to the unlawful status quo ante.

Amar's parallel argument in the exclusionary rule case would have to proceed as follows: the criminal has no right to evade conviction for his crime, so there is no reason to make him whole in the sense of restoring him to the unlawful status quo ante in which he escapes criminal liability. Thus, there is no reason for the exclusionary rule, which would restore him to an unlawful status quo ante by helping him evade conviction. The analogy breaks down, however, because the status quo ante in which the guilty defendant gets away with his crime is not unlawful. The crime itself is unlawful, but there is no additional crime in getting away with it. If a factually guilty defendant lawfully talks the prosecutor out of indicting him, or the jury out of convicting him, he has not committed a further crime.

The difference between the examples is this: No one has a right to retain illegal drugs, stolen goods, or kidnapped people, but we each have a right to retain our presumptive not-guilty status until the state convicts us through lawful processes. If the state resorts to unlawful processes by seizing evidence improperly, the make-whole remedy is to remove the advantage it achieved by breaking the law. That is what the exclusionary rule aims to do.

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<sup>23</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 795 (1994).

This argument provides a backward-looking defense of the exclusionary rule, by justifying the rule as the appropriate way to right a wrong, to make an injured person whole. However, from the Warren Court's point of view, an equally important (or perhaps more important) justification of activism is forward-looking. Well-crafted activist protections of rights create ripple effects leading to further and better protections: they treat the disease, not merely relieve its symptoms. As Judge Richard Neely observed, before the Warren Court criminal procedure cases, police departments (particularly in rural areas) often consisted of poorly trained, poorly screened goons. In Neely's words:

In the early 1960s, the average criminal defendant was treated like a piece of meat on its way to dressing and processing . . . .

Men were routinely picked up off the street without a warrant, brought down to the police station, left to set on hard benches without access to water, food, or sometimes even a clean restroom for hours at a time before "questioning," which frequently involved humiliating insults and a good bit of slapping around. In many cases, the police had nothing more to direct them to their particular suspect than a prior criminal record, the "suspicious behavior" of the arrested person, or personal animosity. The entire "questioning" process went on without any regard for the person's need to be at his job, his school, his wife's side in the hospital, or anywhere else. The convenience of the authorities organized the lives of those without power who came to the authorities' attention. And who was available to give redress? The political process, where most aspirants for office run on a "crack down on crime" platform? The local judge, who would need to dress down the local sheriff or police chief in the morning before they all went out for lunch together? The executive authority, whose very henchmen all these rights violators were? Not very likely.<sup>24</sup>

After the criminal procedure cases, municipalities suddenly discovered that the badly trained officers in the police departments of the mid-1960s were bringing cases that would be thrown out of court. The prospect of criminals walking out the door because "the constable had blundered" by jamming his nightstick into the suspect's kidneys brought about considerable political problems for prosecutors and police chiefs. As Neely puts it, "Oddly enough, jury damage suits, constitutional mandates, the elective political process, and general notions about unmerited suffering and consideration for one's fellowman could not clean up the

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<sup>24</sup> RICHARD NEELY, *HOW COURTS GOVERN AMERICA* 154-55 (1981).

system, but the fear of unemployment managed very neatly.”<sup>25</sup> There is little doubt that the investigative abuses Neely describes in the passage quoted above have become less frequent, and that police departments have become better trained, better educated, more professional organizations that no longer investigate crimes merely by rounding up the usual suspects. This, in turn, means that rights are better secured *before*, rather than after, their violation.

Let us generalize from this example. The Warren Court insisted that to enjoy meaningful protection, and thus to count as rights at all, primary constitutional rights must often be hedged with derivative, prophylactic rights designed to forestall infringements before they happen. This is an activist approach to rights protection. The reactive approach, by contrast, does not find derivative rights implicit in the constitutional guarantee of rights; it rests content with compensating or punishing infringements of primary rights after they have occurred.

Neely may be overly optimistic about how clean the system has become. In fact, some observers believe that the “due process revolution” has only forced police to become more subtle in their constitutional violations.<sup>26</sup> It is also obvious, in the wake of the 1997 torture of Abner Louima by New York City police, the Rodney King beating, and the Los Angeles riots that resulted from it—as well as thousands of less well-publicized instances of police brutality—that police departments still include a substantial number of officers who have nothing but contempt for procedural niceties and even for basic human rights. Far from undercutting Neely’s observations about the efficacy of the Warren Court’s activist approach in criminal procedure cases, however, contemporary police brutality cases demonstrate only that the Warren Court’s successors declined to take its approach far enough, by extending it from the context of investigation to those of arrest and ordinary patrolling. In *Rizzo v. Goode*,<sup>27</sup> victims of police brutality sought an injunction forcing the Philadelphia Police Department to set up internal procedures to deal with complaints of brutality. Justice Rehnquist, writing for the Court,

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<sup>25</sup> *Id.* at 157–58.

<sup>26</sup> For example, David Wasserman writes,

[W]e have observed the double-edged character of appellate review, in exposing error but refining its concealment. The due process revolution . . . has led to more professional and restrained police conduct but also encouraged police perjury, as in the notorious “dropsy” cases; it has reduced the frequency of prosecutorial misconduct, but it also increased its subtlety. These examples suggest the dialectic of appellate review: trial-level actors are subjected to stricter or more searching review; they learn, sometimes with appellate coaching, how to insulate their conduct from this heightened scrutiny . . . .

DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL 245 (1990).

<sup>27</sup> 423 U.S. 362 (1976).

held that the plaintiffs did not have a sufficient personal stake in the outcome of the case to satisfy the case or controversy requirement.<sup>28</sup> Justice Rehnquist, evidently, held to a purely reactive conception of legal rights, and the Court declined to impose an *ex ante* remedy by requiring the Philadelphia police to take precautions against future brutality. Even more to the point of the Rodney King case was *City of Los Angeles v. Lyons*.<sup>29</sup> Adolph Lyons, a twenty-four-year-old black man, was initially stopped by Los Angeles police officers because of a burned-out tail light on his car. Thereafter, he was searched, beaten on the head, and choked to unconsciousness.<sup>30</sup> In the subsequent legal action, Lyons requested not only damages, a reactive remedy, but also an injunction forbidding the police from using chokeholds in the future against suspects who are not threatening violence, an *ex ante* remedy. The Court agreed that Lyons could sue for damages, but denied him standing in seeking an injunction.<sup>31</sup> Had the Court adopted an *ex ante* rather than a reactive conception of rights protection, both these cases might have been decided differently, with practical consequences for the prevention of police brutality about which one can only speculate.<sup>32</sup>

## II.

Not every rights violation requires additional rights fashioned to forestall similar violations in the future. In many cases reactive remedies will suffice. Activist protection is required principally when the rights violation is a part of an institutionalized pattern of violations. Let me introduce a concept from Henry Shue's analysis of rights—the concept of a “standard threat.”<sup>33</sup> The ordinary working of institutions often creates typical, persistent, and chronic threats to our rights. The example of a poorly trained and poorly disciplined police force illustrates this point, as does the example of Jim Crow institutions. When poorly trained police brutally interrogate a suspect, or when segregationist institutions violate the rights of blacks, these are clearly not isolated incidents. They are not the handiwork of a single rogue or maverick official. They entail the pre-

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<sup>28</sup> See *id.* at 371–77.

<sup>29</sup> 461 U.S. 95 (1983).

<sup>30</sup> See *id.* at 98.

<sup>31</sup> See *id.* at 96.

<sup>32</sup> If citizens confronted by police brutality could obtain injunctions requiring the police to forego abusive or dangerous practices like the chokehold, it is quite possible that those practices might be halted much more quickly than they are now; lives would very likely be saved. Of course, it is also possible that judges would deny the injunctions in all but the most egregious cases and that the police might take denials as a green light to engage in even more brutality. Judicial denials of injunctions might also evolve into liability-screening legal doctrines. Activist judges need a healthy respect for the law of unintended consequences.

<sup>33</sup> See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 29–34 (1980).

dictable effect of an institutional cause—a standard threat. In my view, it is principally in cases of standard threats that we have a derivative constitutional right to have the threat dissolved.

We have a right to activist protection only against standard threats, because the world produces too many non-standard threats to protect against them all. To anticipate and guard against all these would require an omnipresent, omnipotent, omni-intrusive, and very expensive government that abandoned all its activities except one: anticipating improbable rights-threatening scenarios that must be warded off. It makes more sense, I think, to leave the unusual rights violations to a purely reactive remedy system. Only the standard threats need to be guarded against in advance. Thus, both activist and reactive rights protections have a proper place in a system of rights.

It is important to see that the two strategies differ markedly in their implications about what our rights are. The activist strategy insists that each primary constitutional right implicitly includes a protective belt, or buffer zone (to use Robert Bork's term),<sup>34</sup> of derivative rights to have standard threats to the primary right curtailed. (In *Griswold*, Justice Douglas uses the term "peripheral rights" to describe the rights lying in the buffer zone.)<sup>35</sup> The reactive strategy, by contrast, simply denies that primary rights entail additional, secondary rights such as the right to *Miranda* warnings or the right to exclude illegally seized evidence. By denying additional rights, it leaves only the right to ex post satisfaction—punishment or compensation—from the rights violator. Thus, an activist strategy of rights protection will recognize more rights than a reactive strategy.

It should now be clear why it begs the question to accuse judges who employ activist strategies of fabricating rights. Against this accusation, we must insist that, as a point of general jurisprudence, a stance favoring activist remedies to standard threats is essential to ensuring that rights are not mere words on paper. We should infer from this that implicit in any legal right are the derivative, prophylactic rights required to protect it. Finally, we may conclude that anyone who denies the bona fides of these derivative rights has simply misinterpreted the concept of a right.<sup>36</sup>

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<sup>34</sup> See BORK, *supra* note 16, at 97.

<sup>35</sup> 381 U.S. 479, 483 (1965).

<sup>36</sup> The idea that the choice of remedial strategies is not merely a contingent afterthought in a theory of rights, but rather that remedies specify both the content and the meaning of rights, is developed and defended in Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1342 (1986). Coleman and Kraus follow the Calabresi-Melamed classification scheme for remedial strategies, distinguishing liability rules, property rules, and inalienability rules. See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–15 (1972). This classification scheme does not map neatly onto the reactive/ex ante/indirect scheme developed here, although a liability rule, which protects rights by permitting a party to obtain compensation from the right-infringer, is plainly a reactive remedy. Coleman and Kraus recognize one of the central features that I

Opponents of activism will deny the premise that rights by their nature demand prophylactic protection from potential infringements. That, they suggest, amounts to a presumption that officials will violate the Constitution if ever given the chance. Instead, reactivists insist, we should presume—pending decisive evidence to the contrary—that officials will respect constitutional rights. To think that every constitutional right also includes the right to have officials deterred from violating it is simply silly.

This difference in perspective highlights an important feature of the activist theory of rights. The theory sometimes requires the restructuring and reform of institutions, frequently governmental institutions, that pose standard threats to constitutional rights.<sup>37</sup> But that entails a willingness to entertain suspicions about social institutions and about government. One must be willing to scrutinize powerful institutions in order to see if a rights violation was merely an isolated incident or, on the contrary, the consequence of the institution's standard operating procedure. Thus, built into the activist outlook is an anti-authoritarian tilt coupled with a penchant for entertaining social and structural explanations of rights violations. Reactivists, by contrast, localize the analysis of responsibility to the single incident that triggered the case. They implicitly attribute rights violations to the misconduct of maverick officials rather than to the sociological structure of the whole system. Similarly, reactivists typically insist as a point of method on granting public authority the benefit of the doubt.<sup>38</sup> Reactivists self-consciously begin with the presumption that public authority is in the main rightly exercised. Thus, advocates of the activist theory typically adopt a skeptical stance toward authority—"Question Authority," in the words of the bumper sticker. Reactivists

attribute to the Warren Court's jurisprudence: "The very idea of a 'liability rule entitlement,' that is, of a right secured by a liability rule, is inconceivable." Coleman & Kraus, *supra*, at 1339. If one adds the idea that a constitutional right is to be not merely protected but secured, then this point implies that the Warren Court's is the only conceivable notion of constitutional rights.

<sup>37</sup> My distinction between activist and reactive strategies of rights protection is related to Owen Fiss's distinction between structural reform litigation and dispute-resolving litigation. See Owen Fiss, *Two Models of Adjudication*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 36 (Robert A. Goldwin & William A. Schambra eds., 1985); Owen Fiss, *The Social and Political Foundations of Adjudication*, 6 *LAW & HUM. BEHAV.* 121 (1982); Owen Fiss, *Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979). Indeed, my argument draws inspiration from Fiss's analysis of structural reform litigation.

<sup>38</sup> To take one well-known example, then-Judge Warren Burger wrote in *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967): "[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion." On such reasoning, a New York court rejected a proposal offered jointly by the defense and the New York County District Attorney that when the police alleged that a defendant had "dropped" a packet of drugs, the burden of proof that the evidence is admissible should shift to the state. See *People v. Berrios*, 270 N.E.2d 709 (1971). Yet the "dropsy" cases in which police aiming to evade search and seizure requirements falsely testified that drugs had been abandoned were frequent and notorious—so frequent and notorious that the District Attorney was willing to stipulate to the gravity of the problem.

typically adopt a deferential stance—"Honor Authority," as the counter-sticker has it.

It is, I believe, this double tendency of the Warren Court's activist account of rights—toward anti-authoritarianism and toward structural explanations—that attracts the wrath of conservative theorists, just as the particular results the Court achieved attract the wrath of conservative politicians. If my argument is correct, however, these features of Warren Court jurisprudence should be accepted as implications of a superior understanding of the nature of rights, rather than dismissed as a mere left-wing crotchet.

Of course, many critics of Warren-style activism base their objections on institutional rather than jurisprudential grounds. They argue along the following lines: "Suppose you are correct that primary rights implicitly include derivative rights to have violations of the primary rights forestalled, including derivative rights to institutional reform. Even if that belief is true—indeed, *especially* if it is true—courts are unsuited to determine which derivative rights and institutional reforms will best protect primary rights. That is a quintessentially legislative task, and it is best left to Congress, to state and local governments, or to the institutions of civil society and the market."

The primary point of this objection is that creative social engineering is hardly the judiciary's forte, because judges are neither elected nor trained to the task. It would be far better if other institutions took on the task of reform. This would reinforce the important point that upholding rights is the responsibility of all governmental institutions and ultimately of all citizens.

But if other institutions were spontaneous defenders of rights, we could dispense with courts altogether. It is a little much to expect the very same institutions of government, civil society, and market that *constitute* standard threats to eliminate them. Misbehaving police officials do not usually dismiss themselves, and racist zoning boards seldom resign in protest over their own policies. Other agencies get along by going along. In the context of reactive remedies, it's obvious why we need courts to protect rights. The only reason it is less obvious when the issue is choosing a regime of prophylactic rights or institutional reforms is that these look like policy initiatives. In one sense they are policy initiatives, but the whole point of my argument has been that they are also entailments of legal rights—and that makes them the proper business of courts. The institutional competence objection tacitly assumes a sharp distinction between policymaking and rights enforcement; but that assumption begs the very question at issue, namely whether in the face of standard threats rights-enforcement requires policymaking. Even if courts are normally at a comparative disadvantage to other institutions when it comes to policymaking, they are at a comparative advantage when the other institutions themselves are the problem.



## III.

So far, I have distinguished two strategies of rights enforcement, the reactive and the activist. In addition, I have intimated that the Warren Court adopted an activist understanding of rights, and that this accounts for many of the so-called "new rights" established by the Warren Court. These include not only the rights of the accused, but others as well: restructuring of institutions to abolish race segregation "root and branch"; the judicial takeover of prisons and mental hospitals that abuse and torment their inmates; the rigid separation of church and state that the Warren Court believed essential to prevent believers from pressuring religious minorities to pray to an alien god—all of these may best be understood as activist protections of constitutional rights.

Finally, I have claimed that the activist approach to standard threats better corresponds with the concept of rights as values deserving especially stringent protection. In saying this, I have assumed that rights can be protected better *ex ante* or indirectly than reactively, but I have not yet argued that this is so. I do so now, initially presenting the argument in bare bones form and then filling in the gaps.

A familiar maxim of bureaucratic life has it that it's always easier to get forgiveness than permission.<sup>39</sup> I shall call this maxim the "Principle of the *Fait Accompli*." A *fait accompli* is harder to undo than to prevent. From this principle, weighty consequences flow. It's always easier to get forgiveness than permission. Therefore, it's always harder to get after-the-fact recompense for official misbehavior than before-the-fact protection from it. Accordingly, reactive rights protection is inherently less reliable than *ex ante* rights protection that nips the infringement in the bud or indirect rights protection that removes the incentive for rights violation. Q.E.D.

"Q.E.D." supposes that the Principle of the *Fait Accompli* is true. It is true, I believe, for three overlapping reasons.

First, permission can be denied privately or secretly, and therefore, denying officials permission to misbehave may be virtually costless to their superiors. But after-the-fact discipline of misbehaving officials generally occurs in response to a public complaint and, consequently, requires publicly visible action. That makes it disagreeable and costly. It creates scandal and bad publicity. It raises questions about why the misbehaving

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<sup>39</sup> I first heard the principle put this way at a conference on nuclear weapons about fifteen years ago, when a military representative made an off-the-cuff remark that if he were in command of NATO forces during a Warsaw Pact assault, he would fire his nuclear weapons regardless of his orders. He explained, "It's always easier to get forgiveness than permission." The principle is an ancient one. Kant refers to the Roman slogan *fac et excusa*, roughly meaning "act first, make excuses later," as a time-honored maxim of political conventional wisdom. See IMMANUEL KANT, *Perpetual Peace*, in KANT'S POLITICAL WRITINGS 93, 120 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) (1795).

official was not better supervised. It generates resentment on the part of the disciplined official, because he has been humiliated. It elicits sympathetic resentment from his co-workers. Moreover, if the official is valuable to the organization, it may be risky to chastize him in public. All of these factors explain why the temptation for a police chief to forgive and forget transgressions by overzealous officers—to stonewall, to deny everything, and to ride out the storm—is enormous. It's easier to get forgiveness than permission, because punishing rather than forgiving is costly, while denying permission is relatively costless.

Second, it is often hard to get reactive satisfaction for rights violations, because the violation has itself put the victim in a worse position to pursue a claim. If a mugger takes all of my money, I cannot call the police on a pay-phone. If a vindictive caseworker throws me off public assistance, I may not have the resources to pursue reinstatement. If I am convicted of a felony based on illegal police procedure, I will have to pursue satisfaction from the confines of a prison cell—knowing that in any future hearing it will be the word of police officers against the word of a convict.

Third, in line with the previous point, the rights violator may benefit from the violation so that he is less likely to be caught and punished for his wrongdoing. The elected official whose organization has fraudulently denied registration to minority voters can now use his power and patronage to squash the investigation and sanitize the files. Similarly, the police control the physical evidence of their own misbehavior. Moreover, they are now public heroes for cracking the hard cases, making it more politically inexpedient to discipline them than before the newspapers ballyhooed their crime-busting exploits.

Taken together, these three reasons allow us to generalize Justice Clark's skepticism about reactive remedies for rights violations. Because it is too likely that offending officials will get forgiveness, we cannot count on reactive remedies. That is why the Warren Court aimed to deny them permission.

It is important to understand what this argument does and does not say. The Principle of the *Fait Accompli* asserts that it is easier for officials to deny permission to wrongdoers than to redress their wrongs after the fact. The Principle does *not* assert that getting institutions to deny permission is easier than compelling them to offer redress. Just the opposite is most likely true. Compelling institutions to deny permission requires activist judicial strategies, such as institutional reform or incentive restructuring. Officials are more likely to resist these activist remedies than a series of lawsuits for compensation, which they find less disruptive of business-as-usual and which they know they will often win for the reasons I have just discussed. To put this distinction another way, the Principle of the *Fait Accompli* implies that an activist remedy is more likely to stop rights violations than a reactive remedy, but it does not im-

ply that an effective activist remedy is easier to fashion. If anything, the Principle suggests that effective activist remedies will be harder to force on recalcitrant wrongdoers than reactive remedies, precisely because they pose bigger threats to the unconstitutional status quo. The Principle of the *Fait Accompli* explains both why activist remedies are harder for courts to devise and more effective when they succeed.

Now, the Principle of the *Fait Accompli* is a reasonably good rule of thumb, but I do not mean to claim more than that. I do not insist that reactive remedies are invariably worse than their activist counterparts, and in cases where an effective reactive remedy can be devised, a court may well prefer it to an activist one. The exclusionary rule is one example of an activist remedy that might bear reconsideration. In the article I cited earlier,<sup>40</sup> Professor Amar advocates abandoning the exclusionary rule in favor of tort remedies against police who unconstitutionally seize evidence. In line with my arguments for the Principle of the *Fait Accompli*, I remain frankly skeptical that juries will award tort damages against the police to convicted felons, even in the unlikely case that the felons are in a position to pursue them. But other reactive alternatives might work better.

For example, when a defendant raises a Fourth Amendment objection to evidence, police could be required to post a hefty bond consisting of projected compensatory and punitive damages for the alleged constitutional violation. If a court finds that the evidence was indeed improperly seized, the state would forfeit the bond, immediately and automatically. The award could go partly to the defendant, partly to his attorney in order to give attorneys an incentive for pursuing Fourth Amendment claims, and partly to a compensation fund for crime victims. A self-executing tort remedy like this could provide a deterrent equivalent to the exclusionary rule, without the justice-defeating effects that rightly disturb opponents of the exclusionary rule. Prosecutors casting a worried eye on their budgets would probably not even attempt to introduce improperly seized evidence, so that in practice the proposed remedy might turn out to be functionally equivalent to the exclusionary rule. If convicting the criminal is important, however, the state could bite the bullet by electing to introduce the evidence and forfeit the bond.

But don't hold your breath. No legislature will ever enact this alternative proposal, and no contemporary court will have the temerity to order it. For that reason, the activist exclusionary rule should remain intact as the best feasible alternative. Remember that the preference for activist remedies derives from an empirical, political judgment of what it takes to secure rights against standard threats. As I have argued, the proposition that rights must be secured by an effective remedy is an entailment of the very concept of a right, but what kind of remedy best secures our rights is

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<sup>40</sup> See Amar, *supra* note 23.

not an issue for the armchair. It is a question about the art of the possible, not the art of the hypothetical. So long as we live in a second-best world (or worse), the bare fact that effective reactive alternatives to activist remedies may be imagined is beside the point, because imaginary remedies do not secure rights against standard threats that are all too real.

#### IV.

One way of understanding the activist account is that any right that is a pragmatically necessary condition for the protection of a constitutional right is itself a constitutional right. But this goes too far. As Richard Mohr has pointed out, such an argument seems to establish an enforceable constitutional right to "breakfast and kidney machines,"<sup>41</sup> since these are certainly necessary to the enjoyment of constitutional rights by those who need them. It sounds very implausible that the concept of rights protection implies legally enforceable welfare rights as a corollary to the Bill of Rights.

As a matter of fact, a powerful argument can be made on behalf of constitutionalized welfare rights. It *has* been made by Frank Michelman in a distinguished series of articles at the end of the Warren Court era.<sup>42</sup> In a philosophical rather than constitutional vein, Henry Shue has offered a powerful argument of this form in his theory of international human rights. Shue defines basic rights as those rights necessary to enjoy other rights and argues persuasively that welfare rights are just as basic in this sense as are rights to personal security.<sup>43</sup> In its broad outlines, I agree with this argument.

Yet, I also agree that courts and the Supreme Court would vastly overstep their authority if they tried to enforce constitutional welfare rights on an activist theory of rights protection. The theory I have been outlining insists on activist protections only against standard threats to our rights that can be attributed to badly structured institutions. Is poverty, the lack of the means to buy breakfasts and kidney machines, a standard threat in this sense? It is, provided that we can locate its origin in structurally flawed institutions. Doing so is not hard—on the contrary, it is easy. But that is itself the problem. For every one of our truly deep-seated social woes, such as poverty, social scientists offer us a welter of

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<sup>41</sup> Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 59 (1986-87).

<sup>42</sup> See Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pts. 1 & 2), 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527.

<sup>43</sup> See SHUE, *supra* note 33, at 13, 34.

competing structural and theoretical explanations. Is the cause of a social phenomenon located in concrete past events—*l'histoire eventuelle*—as many historical chroniclers suppose? Or in class structure, as Marx proposes? Or in technology, as Lynn White ingeniously argues when he attributes the rise of feudal society to the invention of the stirrup?<sup>44</sup> Or in geography, as Montesquieu and Fernand Braudel both suggest?<sup>45</sup> Or, on the contrary, is the whole notion of social causality pluralistic and indeterminate, as writers as diverse as Braudel, Alasdair MacIntyre, and Michel Foucault argue?<sup>46</sup> These questions do not admit of simple answers—or perhaps even complex answers. The more grandiose the effect, the more question-begging the theoretical apparatus needed to locate its cause with any degree of confidence.

This fact, I suggest, is a good or even decisive reason why a court of law ought to steer clear of venturing a diagnosis and cure of poverty—even if it is an activist court that is eager to seek out structural explanations of rights violations. Is the “standard threat” of poverty the product of capitalism, as Marxists believe? Perhaps so, but it seems wrongheaded to base a legal remedy on a theory with as many plausible competitors, not to mention alternative formulations, as Marx’s. Even contemporary Marxist economists still disagree about whether and how the foundations of the theory can be put into defensible form.

We ought to range rights violations along a continuum. At one end will be those that involve quite small-scale and common sense structural explanations; on the other, those that require the grandest speculations to explain. The former include such items as illegal searches, explained by the way the police department is run. The latter include phenomena such as poverty and homelessness. Activist courts can venture confident judgments about which standard threats must be forestalled in the former cases, but must steer clear of the latter.<sup>47</sup>

<sup>44</sup> See LYNN WHITE, JR., *MEDIEVAL TECHNOLOGY AND SOCIAL CHANGE* 1–39 (1962).

<sup>45</sup> See generally 1 FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (Siân Reynolds trans., Harper Colophon Books 1972); 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bks. 14–18, at 221–91 (Thomas Nugent trans., 1949) (tracing the nature of laws to the climate and soil of a nation).

<sup>46</sup> See generally FERNAND BRAUDEL, *AFTERTHOUGHTS ON MATERIAL CIVILIZATION AND CAPITALISM* (Patricia M. Ranum trans. 1979); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A. Smith trans., 1972).

<sup>47</sup> Of course, people can disagree about the causation even of very small-scale matters, such as illegal searches. Some people may blame the police for caring more about arrests than constitutional rights; others may blame unclarity in the Fourth Amendment jurisprudence, which makes it impossible for police officers to know what they can and cannot do. No doubt a court considering an interventionist remedy should first consider hearing evidence on contested factual issues. There remains a world of difference, however, between hearing evidence about why the police conduct illegal searches and why poverty persists. The former seems perfectly plausible, while the latter would be ludicrous. So the continuum is not a slippery slope that threatens to devour all remedial efforts.

In the same way, it seems simply bizarre to think that a court could order the abolition of the capitalist system, even if the judge was confident that Marx's explanation of poverty is right. So just as courts should attempt to ward off standard threats only when their institutional source can be diagnosed with some confidence, they should likewise do so only when the source is one that they can plausibly do something about. (This perhaps explains why so many Warren-era structural reform cases focused on restructuring governmental institutions: they are the easiest to reform, for federal courts simply have more leverage over these than over non-governmental structures.) Finally, it is essential to note that truly deep-seated social restructuring to safeguard the rights of some may require intrusions that violate the rights of others. That is scarcely an argument against sweeping social change, but it *is* an argument against justifying sweeping social change solely by reference to a theory of rights. The protection of rights may itself constrain courts in their reformative efforts, if these efforts are to be justified on the rights-based grounds that I am suggesting motivated the Warren Court.

## V.

So far, I have tried to locate the Warren Court's penchant for finding so-called "new rights" in its preference for *ex ante* and indirect remedial strategies over reactive strategies as a means for securing rights against standard threats. This activist understanding implies that primary constitutional rights create derivative or secondary rights needed to forestall standard institutional threats to them. However, this is not the only way the Warren Court expanded rights, for it recognized rights that are not derivative in this sense from textual rights. Most notably, the Court in *Griswold v. Connecticut*<sup>48</sup> found a general constitutional right to privacy. In *Griswold*, the Court struck down a Connecticut statute forbidding the sale and use of contraceptives, holding that the statute violated a right to privacy implicit in the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>49</sup> Yet none of these amendments mentions privacy, and none of them has anything to do with contraception, cohabitation, or copulation. As Justice Black remarked acidly in conference, "The right of association . . . is for me a right of assembly and the right of the husband and wife to assemble in bed is a new right of assembly for me."<sup>50</sup> The key passage in Justice Douglas's *Griswold* opinion is this:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give

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<sup>48</sup> 381 U.S. 479 (1965).

<sup>49</sup> *Id.*

<sup>50</sup> SCHWARTZ, *supra* note 21, at 577.

them life and substance . . . . Various guarantees create zones of privacy . . . . The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.<sup>51</sup>

This passage, with its penumbras and emanations, is a strange one, and I can attest from personal experience that it attracts a great deal of ridicule in law school faculty lounges. I shall attempt to explain this passage and then to defend it, connecting it in the process with our previous discussion of the activist protection of rights.

I begin with an important and incisive criticism of Douglas's emanation theory by Robert Bork:

Douglas began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." There is nothing exceptional about that thought, other than the language of penumbras and emanations. Courts often give protection to a constitutional freedom by creating a buffer zone, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution . . . .

Douglas named the buffer zone or "penumbra" of the first amendment a protection of "privacy" . . . Douglas then asserted that other amendments create "zones of privacy." These were the first, third . . . , fourth . . . , and fifth . . . .

None of the amendments cited, and none of their buffer or penumbral zones, covered the case before the Court . . . . Justice Douglas bypassed that seemingly insuperable difficulty by simply asserting that the various separate "zones of privacy" created by each separate provision of the Bill of Rights somehow created a general but wholly undefined "right of privacy" that is independent of and lies outside any right or "zone of privacy" to be found in the Constitution. Douglas did not explain how . . . the Court could . . . invent a general right of privacy that the Framers had, inexplicably, left out.<sup>52</sup>

Three points stand out in Judge Bork's analysis. First, he analyzes Douglas's "penumbral rights" as buffer zones "prohibiting a government from doing something not in itself forbidden but likely to lead to an inva-

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<sup>51</sup> 381 U.S. at 484-85.

<sup>52</sup> BORK, *supra* note 16, at 97-98.

sion of a right specified in the Constitution.”<sup>53</sup> That is, Bork understands penumbral rights to be *exactly* the derivative, secondary rights implied by an activist theory of rights protection. *Miranda* warnings and the exclusionary rule of *Mapp* are penumbral rights.

Second, Bork has no objection at all to the idea of penumbral rights; although he finds Douglas’s terminology “exceptional,” he accepts the theory itself. Bork is an activist.<sup>54</sup>

Third, however, is Bork’s actual criticism of Douglas. What Bork objects to is not penumbral rights, nor even penumbral rights creating zones of privacy—though he doubts that privacy is the real issue. What he objects to is the idea that the specific privacy rights emanating from various amendments can somehow fuse and create a general, self-standing privacy right—one that exists on an equal footing with the explicit guarantees of the Bill of Rights and that is capable of independent growth and development. He puts the objection most clearly in an earlier version of the argument I have just quoted:

Justice Douglas . . . performed a miracle of transubstantiation. He called the first amendment’s penumbra a protection of “privacy” and then asserted that other amendments create “zones of privacy.” . . . One more leap was required. Justice Douglas asserted that these various “zones of privacy” created an independent right of privacy, a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.<sup>55</sup>

Bork’s analysis of *Griswold* has the advantage of great lucidity. On his view, the Warren Court reached the right of privacy in two steps. First, it inferred penumbral rights from explicit constitutional guarantees, using the method expounded in the first section of this paper. Second, it fused various penumbral rights of privacy into a kind of super-right of privacy. According to Bork’s analysis, the first step is sound, but the second is not. That is why Justice Douglas’s argument fails.

Bork never actually argues that the second step is unsound. To see more clearly why specific privacy rights cannot be fused into a general right of privacy, it will help to examine a similarly unsound argument from a wholly different area of law, the law of testimonial privileges. The common law recognized five chief privileges: the privilege against self-incrimination, the attorney-client privilege, the physician-patient privi-

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<sup>53</sup> *Id.* at 97.

<sup>54</sup> Indeed, penumbral analysis carries no built-in bias toward left-of-center values. See Glenn H. Reynolds, *Penumbra Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992).

<sup>55</sup> Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8–9 (1971).



lege, the clergy-communicant privilege, and the spousal privilege. All of these except the right against self-incrimination are in reality double privileges. For example, the attorney-client privilege grants attorneys the right to refuse to testify about their clients, but it also grants clients the right to compel their attorneys not to testify about them even if the attorneys want to do so. The other three privileges are similarly two-sided.

The law governing these privileges is complex, and the privileges are riddled with exceptions and exceptions to these exceptions. None of that will be my concern in this Article. Here I am concerned only with the underlying motivation of these privileges and with whatever light it may cast on Justice Douglas's derivation of the right of privacy.

Let us leave the privilege against self-incrimination to one side and consider only the four interpersonal privileges. Each of these is justified most commonly by an instrumental argument having to do with chilling effects. Without the privileges, so the argument goes, communication between attorney and client, physician and patient, clergyman and communicant, and husband and wife would be chilled by the fear that the other party to the communication could be compelled to reveal guilty secrets in a court of law. The law grants the privileges because it officially recognizes the intrinsic importance of these four relationships and the goods realized by free communication within them.

Two points are particularly relevant to our present inquiry. First, when the privileges are justified by the standard instrumental argument about chilling effects, we see that each privilege is a penumbral right. Because I have a right to confer with legal counsel I need *ex ante* protection, via the attorney-client privilege, against the chilling of that right; and similarly with the other privileges.

Second, not only are these testimonial privileges, they are penumbral rights of privacy. The derivation of the five testimonial privileges thus corresponds to the first step in Douglas's derivation of the right of privacy, at least as Bork reconstructs it. This characterization allows us to comprehend the devastating power of Bork's criticism of the second step. For the corresponding second step in the law of testimonial privilege would drop the limitation to five specified relationships and discover something like a *general testimonial privilege* lurking in the penumbras. And what is a general testimonial privilege? The closest I can come is this: it is a general presumption that no one may be compelled to offer testimony about anyone else, combined with a general presumption that any litigant may prevent testimony against him. A general testimonial privilege would simply bring adjudication as we know it to an end. Thus, what we have here is a *reductio ad absurdum* of the two-step procedure for deriving self-standing rights from overlapping penumbral rights. If Bork is correct that this was Justice Douglas's procedure, we should accept his critique and acknowledge that the right of privacy was nothing more than the Warren Court's constitutional concoction.

It is my view that Bork's analysis of *Griswold* is, for all its lucidity, dead wrong. The key passage in Douglas's opinion—the theory of penumbras and emanations—does not employ the two-step procedure. Rather, it employs a very different procedure—one that is richer, more philosophical, far more ancient, and *much more radical* than the emanation and fusion of penumbral rights.

To see what is wrong with Bork's two-step reading of *Griswold*, we must begin not with the second, "fusion" step, but with the first. In the first step, specific zones of privacy are constructed on the periphery of primary constitutional rights in order to protect the primary rights in an activist manner. The primary rights Douglas names include rights contained in the First, Third, Fourth, and Fifth Amendments. For simplicity, or perhaps perversity, I will focus on the Third Amendment, which reads, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."<sup>56</sup> The example is simple, because there has been only one domestic federal case ever on the Third Amendment and no Supreme Court case.<sup>57</sup> Thus, we don't have to distract ourselves with alternative construals of the Third Amendment.

The right of privacy, then, is supposed to be an indirect protection of our Third Amendment right to exclude soldiers from our homes. But how? A right to privacy does not exclude soldiers from our homes any more effectively than does the Third Amendment itself. In fact, the relationship makes sense only the other way around. Though the right to privacy does not help protect our Third Amendment rights, the Third Amendment can help protect the relevant right to privacy, namely privacy in our own home. A platoon of soldiers billeted in the basement would dampen not only freewheeling political talk around the dinner table, but also the noisy nocturnal activities that *Griswold* indirectly contemplates. By forbidding the government from installing infantry in the house, the Third Amendment wards off what might otherwise become a standard threat to privacy.

*The Third Amendment thus belongs to the penumbra of the right of privacy, not the other way around.* The Fourth Amendment right against illegal searches and the Fifth Amendment right against forced self-incrimination are similarly penumbral rights—activist protections of our privacy against standard governmental threats.

At this point, let us return to the key sentence in *Griswold*: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>58</sup>

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<sup>56</sup> U.S. CONST. amend. III.

<sup>57</sup> See *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982); see also *Ramirez de Arellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983).

<sup>58</sup> 381 U.S. at 484–85.

Bork reads the sentence as though it contains a comma after the second occurrence of "guarantees"; in that case, "those guarantees" refers to the specific guarantees in the Bill of Rights which have penumbras. On this reading, the sentence means:

Specific guarantees in the Bill of Rights create penumbras that help give the specific guarantees life and substance.

This construal simply restates the activist theory of rights. But, as Richard Mohr has pointed out in a penetrating analysis of Douglas's penumbra metaphor, the wording and punctuation of Douglas's sentence point to a different reading. Let me repeat Douglas's sentence with appropriate emphasis: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from *those guarantees that help give them life and substance.*" Mohr argues that it should be understood as follows: "Specific guarantees have penumbras which are formed by emanations from those *general* guarantees that help give the specific guarantees life and substance. The right to privacy is just such a general guarantee."<sup>59</sup> Mohr goes on to explicate the "penumbra" metaphor:

Penumbras—areas of half light and half shadow—are not caused by the areas of full light which they abut. Rather the light of penumbras and the light of areas of full illumination have *the same source* . . . . The specific explicit guarantees of the Constitution are areas of full illumination. The right to marital contraception and the like are areas of half light and half shadow, and what the state may bar or require is an area of total shadow. Privacy understood as a general right is the source of light producing *both* explicit *and* implicit protections of the Constitution . . . . [C]ritics . . . have misconstrued his careful metaphor.<sup>60</sup>

I think this is largely correct. In a moment, I will want to vary Mohr's reading of the metaphor, but before doing so let us notice a peculiar implication of these arguments. On Mohr's reading of *Griswold*, Douglas's key sentence refers to general constitutional guarantees that are nowhere mentioned in the Constitution, but whose existence must be posited to give the specific guarantees life and substance. We have seen how an activist theory of rights protection can derive nontextual rights as penumbras of the specific guarantees. However, the general guarantees we are

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<sup>59</sup> Mohr, *supra* note 41, at 62.

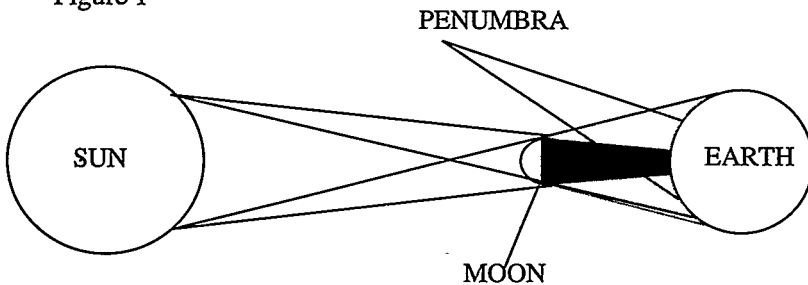
<sup>60</sup> *Id.* at 62–63. For another attempt to puzzle out the metaphor, see Burr Henly, "Penumbra": *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 96–100 (1987). See also Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1172 n.212 (1989).

speaking of now are not penumbral rights; rather, they are the light sources that create the penumbras.

The same result follows from my discussion of the Third Amendment, according to which the Third Amendment must be understood as a penumbra of the right of privacy, not the other way around.<sup>61</sup> That is, the Third Amendment belongs to the penumbra of a right that isn't in the document at all. Mohr, Douglas, and I seem to regard textual rights as mere corollaries of an invisible and unwritten right. What can this mean?

To answer this question, I want to venture a slightly different reading of the penumbra metaphor. Every shadow has a penumbra, but the word is most commonly used when we talk about one particular shadow—the shadow cast by the moon on the earth in a solar eclipse. If this is indeed the imagery Douglas meant to invoke, the general right of privacy is not just any source of illumination. It is the Sun itself. The penumbra of a solar eclipse has the important property that those people who are in it—unlike those in the umbra, the full shadow—can see the Sun.<sup>62</sup> The Third Amendment in its penumbral aspect provides a vantage point from which we can see the Sun—the right of privacy that is protected by forbidding the quartering of soldiers.

Figure 1



To see what this metaphoric talk of vantage points might mean, let us return for a moment to testimonial privileges, which are best thought of as activist or penumbral protections of our right to enjoy confidential relationships with our attorneys, our doctors, our clergymen, and our spouses. The natural question that occurs to us is “why just these?” The physician-patient privilege has been extended to psychologists and coun-

<sup>61</sup> Douglas's language in *Griswold* confirms this reading. He states, “The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy.” 381 U.S. at 484. Douglas states that the Third Amendment is a facet of the right to privacy—the same right to privacy, as the context makes clear, that the First, Fourth, and Fifth Amendments also manifest. Douglas does *not* state that the right to privacy is a facet of the Third Amendment or a right on the periphery of the Third Amendment (the way that the right of association lies on the periphery of the First Amendment). See 381 U.S. at 483.

<sup>62</sup> See *infra*, Figure 1.

selors; the spousal privilege has been extended in three states to a parent-child privilege; and several jurisdictions have established accountant-client privileges. Why not extend the privilege to financial planners, insurance salesmen, who often receive sensitive financial information from their customers, grandparents, unmarried lovers, or best friends? What principle limits the privilege to certain people and relationships?<sup>63</sup>

To answer these and similar questions, one needs some sense of what makes the four original relationships especially important. I suggest that these four relationships correspond to four fundamental aspects of human social personality. I am, firstly, a physical body subject to all the infirmities and corruptions of the flesh; hence, the right to speak confidentially with my doctors. Secondly, I am a social and loving being who may find a life's companion to share that love—a love that demands openness; hence, the spousal privilege. Thirdly, I am a moral and spiritual being, with a soul to tend and a burden of guilt that must be given voice; hence, the clergy-communicant privilege. Fourthly, I am a citizen, a juridical person living in a network of public rights and relationships that are fragile, shifting, and hard to understand; hence, the attorney-client privilege. By recognizing and sanctifying the physical self, the social and loving self, the moral and spiritual self, and the juridical self, these testimonial privileges are shaped to fit the contours of an entire philosophical anthropology—an answer to Kant's question "What is man?"

To make sense of the law of privilege, we must view the four privileges as penumbral protections of the four privileged relationships; and these, in turn, we best regard as themselves penumbral protections of the four fundamental aspects of human existence I have just enumerated. The relationships emanate from these basic aspects of existence, and the privileges emanate from the relationships.

This way of putting things, a scholastic might have said, corresponds to the "order of being." In the "order of knowing," however, we reason in reverse. We begin, therefore, with the positive law as we find it—in this case the particular testimonial privileges. The standard chilling effect argument directs our attention to the relationships that the privileges are there to protect, and reflecting on those relationships leads in turn to the human goods that make them so special.

This analysis allows us to understand what it means to regard a piece of positive law as a vantage point from which to glimpse a more general principle that gives it life and substance. It means that the positive law forms the starting point for a dialectical inquiry into the principles that underlie it. To apply this dialectical mode of analysis to the Third Amendment, we first ask what is so burdensome about quartering soldiers in

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<sup>63</sup> See Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631.

one's home. This question directs us to what is valuable about a home. One plausible answer is that a home is a protection of the life that goes on within it, fostering it by shielding it from the outside world.<sup>64</sup> In this way our vision is directed to the importance of private activities in leading a decent life.

We are led dialectically up the ladder of being from the positive law to the basic values it protects. We are turned from the shadows to gaze at the Sun from which our rights emanate. By this time, it should be obvious what set of allusions I find in Douglas's metaphor, for he is calling to mind one of the basic images in Western philosophy and religion. It is, of course, the analogy of the Sun in Plato's *Republic*, where Socrates likens the Good to the Sun.<sup>65</sup> He provides an elaborate set of metaphors—the Sun, the divided line,<sup>66</sup> the myth of the Cave<sup>67</sup>—to explain that any properly conducted inquiry leads us up the ladder of generality from particular instances or images to general principles. Finally, it leads us to the Good itself, just as the cave-dweller turns his gaze from shadows to the things that cast them and then steps out of the Cave into the light of the Sun. This light is too bright to apprehend directly, but it makes all other seeing possible.

I do not know whether Douglas consciously and specifically intended a Platonic allusion. But Plato's image is a familiar figure in Western letters, readily available to the imagination even of those who have never studied the *Republic*. The Platonic metaphor is a natural one for anyone who, like Douglas, has enjoyed the benefit of a traditional education in the humanities.<sup>68</sup>

<sup>64</sup> "The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting). On the analysis I am presenting here, Harlan's argument should be turned around: the integrity of family life is so fundamental that explicitly granted Constitutional rights (such as the Third Amendment) draw their underlying principle to its protection.

<sup>65</sup> See PLATO, *THE REPUBLIC* 508b–c. (In view of the large number of editions and translations of the *Republic*, I do not cite any edition in particular, but rather use the standard Platonic reference system.)

<sup>66</sup> See *id.* at 509c–511e.

<sup>67</sup> See *id.* at 514a–517c.

<sup>68</sup> Henly, *supra* note 60, comes close to this analysis of the penumbra metaphor, but in the end fails to appreciate the metaphor's full significance. He notices the solar imagery in the penumbra, but objects that in that case Douglas should have spoken of a corona rather than a penumbra. *Id.* at 97–98, 98 n.109. This misses the point: the corona is part of the Sun's atmosphere; the penumbra is part of the surface of the Earth. A bit later, Henly treats the metaphor more or less as Mohr does, see *id.* at 99 fig.4, but expresses puzzlement at the light source, which he suggests may be the police power or the majority will. See *id.* at 99. My reading puts together these two pieces of the puzzle, interpreting them in the light of the Platonic allusion.

For that matter, the "emanation" metaphor is also Platonic in origin. Plotinus, the most important neo-Platonist in antiquity, describes the whole of existence as an "emanation" that "may be compared to the brilliant light encircling the sun." PLOTINUS, *THE ENNEADS* 374 (4th ed. 1969, S. MacKenna trans.). Plotinus's followers developed elaborate and in-

What I am suggesting, then, is this. *Griswold* does not use a two-step method to construct the right of privacy, with one step deriving penumbral rights and the next step fusing them, as Bork suggests. *Griswold's* method is instead a Platonic mirror-image of the activist derivation of penumbral rights. Instead of deriving rights penumbral to the Third Amendment, Douglas regards the Third Amendment as itself the penumbra of some principle that allows us to understand what it is doing in the Constitution. Presumably, critics such as Bork would agree that the framers included rights in the Bill of Rights because they perceived certain standard threats that must be warded off—threats such as forced self-incrimination, illegal searches, or the quartering of soldiers. Douglas asks what values these threats endanger. Just as Plato insists that we view tangible objects as mere images of the invisible mathematical laws that explain them, the Warren Court insisted that we view positive law, including constitutional rights, as an image of the underlying values positive law seeks to protect. Ronald Dworkin's jurisprudence is a faithful representation of this half of the Warren Court's approach to rights.<sup>69</sup>

It is instructive to compare this approach with Justice Harlan's concurring opinion in *Griswold*. Harlan sees no need to begin with the specific rights in the Bill of Rights in order to discover through dialectical inquiry which general rights enjoy constitutional protection. Instead, he states,

the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty." . . . While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.<sup>70</sup>

Harlan's approach is much more vulnerable than Douglas's to the accusation that it invites judges to project their own social philosophies onto the Constitution. An inquiry like Douglas's is constrained by the requirement that general rights must plausibly explain specific rights by tying them to values important enough to belong in a constitution. Harlan's inquiry is constrained only by the requirement that general rights must be

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comprehensible emanation-theories, but lost their sectarian battles with the early Christians. However, St. Augustine incorporated Platonic and neo-Platonic doctrine into the mainstream of Western Christianity; and the imagery of all existence emanating from God is a familiar one in Christian mysticism.

<sup>69</sup> See generally RONALD DWORIN, *LAW'S EMPIRE* (1986); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1978).

<sup>70</sup> 381 U.S. 479, 500 (1965) (Harlan, J., concurring). The phrase "implicit in the concept of ordered liberty" comes from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

implicit in the concept of ordered liberty. Harlan's constraint is not entirely empty, but whatever content it has derives from an analysis of the concept of ordered liberty—in other words, from an elaborated social philosophy unmoored in the specific values protected elsewhere in the Constitution.

This isn't to say that Douglas's procedure provides a formula for cranking out incontestable answers to constitutional questions. Fundamental disagreements are possible over what values specific rights protect and what threats they protect against. Is the value underlying the Free Speech Clause personal expression, political debate, or market liberty? Is the Bill of Rights a guarantee of federal protection against standard threats posed by state governments, as liberals believe, or a limitation on the standard threat of a tyrannical federal government in order to allow the states to legislate more freely, as conservatives prefer to think? Douglas's procedure alone cannot answer these questions. (Nor does it tell us whether they should be answered by original intent, textualism, or living constitutionalism). But it can and does show us what questions need to be answered and why answering them may lead from textually specific rights to general rights mentioned nowhere in the text.

Putting Douglas's Platonic way of viewing legal rights together with the activist approach I discussed earlier, we can at last appreciate the full magnitude of the Warren Court's contribution to the theory of rights, particularly constitutional rights. The Warren Court began with specific textual rights and then proceeded to elaborate them simultaneously in opposite directions. First, the Court reasoned from these rights "down the line" to the penumbral rights that must be recognized and explicitly stated in order to secure the textual rights from standard institutional threats. Second, the Court reasoned from the textual rights "up the line" to the general values that these rights protect. In this way, the Warren Court gave meaning to the notion of a right as the moral and legal embodiment of a value that stands in need of stringent protection. The Court's activism secured the protection, and its Platonism measured the value.