Rights, Rhetoric and Reality: A New Look at Old Theory

Albert Broderick O.P.
Do convicted prisoners have a "right of rehabilitation?" I raise this question for discussion, not so much to contend that they do, or they do not, but as a vehicle for arguing a broader proposition: If we would substitute reality for rhetoric, we would consider "rights" as "social" rather than merely "individual." Our whole focus of discussing "rights" is distorted—and I am speaking of "legal rights," and more particularly new "rights" that have not previously received legal recognition.

We recall that we are a constitutional people, that our Federal Bill of Rights was adopted as a restriction upon governmental activity, a limit upon the power of legislative and executive action. We point out that John Locke had laid the foundation with the notion that when men entered society they with-
held certain “natural rights” for themselves as individuals, which the state may not infringe.\(^2\) True, some opponents of the Bill of Rights contended it was unnecessary, that all its specific limitations were understood in the document written in Philadelphia as it stood. But those who wanted them written down prevailed. And the “individualistic” diction has persisted in the

2. As Mr. Justice Jackson put it: “The whole constitutional philosophy of the time was based on a system of values in which the highest was the freedom of the individual from interference by officialdom—the rights of man.” R. Jackson, The Supreme Court in the American System of Government 3 (1955).

The historical antecedents of the individualist “natural rights” doctrine in American law are hardly disputed. The English writer who first put the focus on “right” as being totally individual, and not social, was Thomas Hobbes. His hypothetical “social contract,” however, left no recourse in law for the individual against the sovereign. John Locke, also using “social contract” terminology, accented “inalienable rights” of the individual (with a special emphasis on property) which the government was morally held to respect. However, Locke left the individual no legal recourse for violation, merely the extralegal recourse of revolution. It was Locke whose ideas chiefly inspired the American revolutionary and constitutional documents, although Jean Jacques Rousseau was not without influence. The “natural rights” doctrine in the 19th century American law had its chief impact in the “vested rights” doctrine concerning property.

The definitive philosophical study of the origins and implications of individualist “natural rights” doctrines has not yet been written. It will require attention to the fact that in Western thought until the 14th century (Greek, Roman and medieval Christian thought) the notion of *ius* was of something objective (justice). William of Occam, denying the reality of anything but individuals, first shifted the emphasis upon *ius* from objective social considerations (which included what was naturally due to individuals) to the unitary view that *ius* (now “right”) was the faculty of an individual. The impact of this doctrine was not widely felt until Hobbes. Hobbes, following Occam, wrote that the individual on entering organized society brought with him as “civil rights” those rights the sovereign by the “social contract” agreed to enforce—but with no recourse against it if it did not. Locke would give the subject moral, but no legal recourse. Under our constitutional law, “the people” adopted the basic rules they chose to live under, including limitations upon governmental action. The Supreme Court under the doctrine of judicial review enunciated in Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803), construes these social rules of limitations, even against other governmental authorities.

The thesis here is that just as the Constitution (including the Bill of Rights) is a social document, so are the continuing “interpretations” of the document by the Court—and by Congress and the Executive as well. This is particularly applicable to its interpretations of the “vague” clauses of the Constitution, such as “due process” and “equal protection.” The thesis does not say that the Court has the social function or “right” to “amend” the Constitution, since the power of amendment is allocated elsewhere. Much of the emotional discussion concerning the Court concerns differing views as to what constitutes amendment, and what constitutes merely “interpretation.” But this has nothing to do with the thesis here—that law, including constitutional law, is essentially social.

One society (such as our own) may more highly value individual interests (say “moral rights,” if you like) than another. This “individual rights” problem continues also to beset European juridical thought. In France, for example, the *droit* (right) is chiefly conceived as “droit subjectif,” the right of the individual. For a brilliant recent historical treatment urging a return to objective, realist, social focus upon “right,” see M. Ville, Droit Subjectif, in Seize Essais de Philosophie du Droit 140 (1969). See Delos, The Theory of the Institution, in The French Institutionals (Broderick ed., Welling transl. 1970). But see P. Rouvier, Droits Subjectifs et Situations Juridiques (1963); J. Dabin, Le Droit Subjectif (1952).
courts which interpret such clauses as “due process,” “establishment of
religion,” “freedom of speech, or of the press,” “unreasonable searches and
seizures” and “just compensation.” In a traditional passage in one of his
most controversial opinions, Chief Justice Warren recalled that “the Con-
stitution has prescribed the rights of the individual when confronted with the
power of government . . . .”3 And these the state cannot infringe.

This emphasis upon such “rights,” as rooted, property-like, in individuals,
mistakes the procedural function of the individual. Put bluntly, my sug-
gestion is that every legal right is a social right. The individual is simply a
subject bearing that claim before a court for its consideration in a “case or
controversy.” If the court agrees with him, the individual will be rewarded
by winning his case and its fruits. And, other individuals of which he is a
type will likewise benefit from the socio-legal rule laid down. This novel
assertion will take a lot of convincing, so firmly lodged is the prevailing indi-
vidualistic formulation. My aim is to etch out a few reasons for considering
the proposition.

There is a surprising tendency, even with those who should be embar-
rassed to be so obvious, to define a “right” as a “legally protected interest.”
The interesting question is this: What criteria does a legislature, or a court,
use in identifying a new interest that is henceforth to obtain that legal pro-
tection? This question arises in our legal system most dramatically, but not
exclusively, when a court decides whether an individual plaintiff asserting a
“right” shall have his way against the claim of the other side (often a gov-
ernmental unit) that he is mistaken. Mr. Gideon asserts he has a “right to
counsel” of enlarged dimensions; the State of Florida says that he does not.4
Miss Mapp asserts that she has a right not to have evidence used against her
which was obtained by police who invaded her home without the magic war-
rant; the State of Ohio says that she does not.5 Mr. Miranda says that he
has a right not to be convicted with the help of confessions obtained by police
without giving him careful warnings; the State of Arizona says that he does
not.6 In each of these cases the United States Supreme Court, as the ulti-
mate decision-maker in our constitutional system, agreed with the individ-
ual and ruled against the state. In doing so the Court argued, explicity or
implicitly, along these lines: The Bill of Rights has placed certain restrictions
upon what a state may do with respect to its citizens; the precise lines of
these limitations are not always clear. True, the rights asserted by the indi-
vidual are not absolute, but in the context before us, and in similar cases, a

careful balancing of the interests of the individual and those of the state makes it clear that the individual should prevail—that he has a "right"—a right to counsel in all serious criminal cases (Gideon), a right not to be convicted with illegally seized evidence (Mapp), a right not to be convicted with confessions obtained without warnings which we hereby make precise (Miranda).

The proposition which I here offer for professional criticism and debate is this: In law there are no merely individual rights. Every civil right is a social right. The dichotomy of interest of individual and interest of society (I need not say state) is an inheritance of Lockean and Rousseauian political theory based on the fiction of the social contract. More properly we should say that our courts and legislatures in declaring new rights make this determination: The accepted legal-political-social-moral ideas of our society put so high a social value upon the claim which this individual plaintiff makes here today, that we view his claim, on behalf of himself and others similarly situated in our society, as deserving vindication in this context against the (perhaps) also important social ideal advanced by his opponent. The individual has argued for the high value our society has put upon his not being forced to incriminate himself; the state has argued for the practical needs of law enforcement in a society troubled by crime. The true focus is not "balancing of interests"—individual against society—it is in weighing society's competing interests, or values, in a given context. That is my thesis. What kind of support for it can be found in the cases? Not a great deal, if we limit our inquiry to what courts have said—a few respectable blocks on which to build, if we attend to what some courts have done.

I. Some Respectable Precedent

Perhaps the most graphic example of rights as social comes in constitutional law in the sacred precincts of the first amendment, of all places. Without stirring up the controversy about whether first amendment rights still have a "preferred position," we note the strong protection given to individuals who

7. The "preferred position" doctrine, which is somewhat in eclipse, derived from Justice Stone's celebrated footnote in United States v. Carolene Prods. Co., 304 U.S. 144 (1938). After using a "rational basis" test for upholding a federal statute excluding filled milk from interstate commerce, Justice Stone inserted this note:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Id. at 152 n.4. The suggestion was taken up in Kovacs v. Cooper, 336 U.S. 77 (1949);
assert rights of speech, press and association. This protection is not keyed to the intrinsic value of a particular utterance or protest or group; it rests expressly upon the high value placed by our political system in keeping open the channels of change. The courts stress that the prospect of legal change depends upon the continuing availability of avenues of effective stimulation of new ideas, even ideas which are unpopular at the moment. It is here that the notion arose that only a "clear and present danger" to the society overrides the social interest in maintaining free expression. 8

Other instances in the constitutional field include the interpretation of the fourth amendment search and seizure provision, and the use of the fifth amendment's self-incrimination clause to reverse convictions based upon both involuntary confessions and those confessions not surrounded by particularized safeguards. These rights are vindicated although there may not be the slightest question in anyone's mind that the individual did the crime alleged. Society's interest is the determinant here. This was recognized by Mr. Justice Stewart: "[t]he exclusionary rule . . . balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence." 9

Further accent upon the social character of the interest asserted by the individual plaintiff in these cases comes from the limitations put by the Supreme Court upon the effective coverage of the new dimensions given by the Mapp and Miranda cases. In Linkletter v. Walker, 10 the plaintiff had been convicted after Miss Mapp; yet the rule in her case was held to apply only to cases tried subsequent to, or actively in the judicial process on, the date of the Supreme Court's Mapp decision. In Johnson v. New Jersey, 11 the appellant (among "some 80" others) had filed the case in the Supreme Court before Miranda was decided. Yet only Miranda, and three appellants whose cases were argued with Miranda, got the benefit of the Miranda rules. 12

9. Chapman v. California, 386 U.S. 18, 44 n.2 (1967) (concurring) where the possibility of "harmless error" was left open.
12. The most notorious example [of applying a new rule only to the case where it arises] is Miranda v. Arizona . . . where, as I recall, some 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any
outraged dissents of Justices Black and Douglas in *Linkletter* and *Johnson* are unanswerable if a theory of individual rights is strictly honored and equality of treatment is still held in esteem.

The doctrine of "standing" to sue, a doctrine which has had a special basis in the federal courts because of the constitutional requirement that there be a "case or controversy,"¹⁸ has been rested upon the premise that an individual claim that his "legal right" has been infringed. The Federal Communications Act gave a right to appeal an order of the FCC to the immediate applicant whose claim was denied and to "any other person who is aggrieved or whose interests are adversely affected" by a Commission decision granting an application.¹⁴ Sanders Brothers Radio Station intervened in an FCC proceeding in opposition to an application by a newspaper in the city across the river for a construction permit to build a broadcasting station. The permit was granted and Sanders Brothers sought to appeal as a "person aggrieved." The Supreme Court specifically found that Sanders Brothers had suffered no injury to a traditionally recognized interest ("right"), yet it upheld its standing to appeal as a "person aggrieved" within the intent of the statute: "Congress had some purpose in enacting § 402(b)(2). It may have been of [the] opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."¹⁵ The same Court that was not willing to recognize economic injury to Sanders Brothers as a competitor as sufficient to give a statutory right to appeal, found that they could sue as bearers of the social interest in testing administrative irregularity. This point was made sharper two years later in *Scripps-Howard Radio* where the Court said: "these private litigants have standing only as representatives of the public interest."¹⁶

A further step in this type of analysis was taken in 1943 by Judge Jerome Frank in the *Associated Industries* case.¹⁷ The plaintiffs, a coal consumers'...
trade association, attempted to appeal a decision under the "[a]ny person aggrieved" section of the Bituminous Coal Act of 1937. A recent Supreme Court decision had ruled that consumers had no standing to bring an action to enjoin enforcement of the Secretary of the Interior's order. Frank distinguished Associated Industries from that case on the ground that this was a statutory appeal action, and not an original injunction suit. He then faced squarely the contention that the standing doctrine would still bar appeal. Congress could not authorize suit in the absence of a justiciable controversy, he conceded, but there was such a controversy here, even though the plaintiffs had suffered no detriment to a traditionally recognized legal interest. Citing Sanders Brothers and Scripps-Howard, Frank's analysis broadened the basis of those cases beyond their level of putative statutory interpretation. Plaintiffs were acting, said Frank in a creative mood, as "private Attorney Generals," vindicating the public interest:

[Congress] can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers . . . . Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers.

This is true, said Frank, "even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."

Similar concern by the law in vindicating social interests is seen in private informers' suits and in suits under Section 16(b) of the Securities Exchange Act. Even the clearest instance of a suit for breach of contract rests upon the social interest in having agreements enforced, and this is done through permitting the aggrieved individual to bring legal action. Where social policy is otherwise, as in wagering contracts, there is no legally cognizable right.

In his celebrated Minnesota Mortgage Moratorium decision in 1934, Chief Justice Hughes underscored the constant interplay of interests in the tra-
ditionally private field of mortgage contracts. A Minnesota statute permitted local courts to extend the period of redemption from foreclosure sales “for such additional time as the court may deem just and equitable.” Mortgagors cited the specific “obligation of contract” clause as well as the due process and equal protection clauses of the Federal Constitution as rendering the act unconstitutional. Replying to the “contract clause” argument, Chief Justice Hughes said:

Not only are existing laws read into contracts in order to fix obligations between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. 25

The opinion cited the developing history of “[t]his principle of harmonizing the constitutional prohibition with the necessary residuum of state power.” 26 Grants of exclusive privileges in charters of private corporations could not be implied against the state. Legislatures cannot “bargain away the public health or the public morals.” 27 A valid lottery authorized by express state authority may be revoked without redress; similarly an authorized liquor business or a nuisance specifically authorized by contract may be abated. “The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred [just above].” 28

The Chief Justice contested the notion that because the founders had no such view when the Constitution was adopted, there could be no constitutional development in this direction. Citing “a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare,” 29 Hughes turned to the historical argument:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their

25. Id. at 435.
26. Id.
27. Id. at 436.
28. Id. at 439.
29. Id. at 442.
time, would have placed upon them, the statement carries its own refutation.\textsuperscript{30}

He then cited Chief Justice Marshall's "memorable warning" made "to guard against such a narrow [interpretation]. . . . 'We must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'"\textsuperscript{31}

While Chief Justice Hughes, in the passage above, did use the "individual rights and public welfare" terminology, he later made clear that he intended that protection of "individual rights" was itself a public interest: "The [state] legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society."\textsuperscript{32} The competing "individual rights" of the mortgagors and the mortgagees were resolved by the legislation and constitutional interpretation, in the crucible of the "basic interest of society." In this inescapable sense, we may argue, all legal rights are social rights. As Justice Jackson said in the context of denials of hearings in immigration cases: "Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on \textit{ex parte} consideration."\textsuperscript{33}

\section*{II. The Inadequacy of "Individual Rights" Theory}

All these instances, it may be suggested, do no more than stand for the proposition that some rights which are vindicated by individuals are social rights, and that some individual rights are qualified by needs of the whole society. They do not, it may still be contended, establish that every legal right is a social right; and Chief Justice Hughes' statement in the \textit{Minnesota}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 442-43.
\item \textit{Id.} at 443, \textit{citing} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).
\item \textit{290 U.S.} at 445.
\begin{quote}
Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.
\end{quote}
\end{enumerate}
\end{footnotesize}
Mortgage Moratorium case that we need not adhere to the precise understand-
ings of the framers would clearly cover a change in our legal theory and terminol-
gy, but it does not justify the change proposed herein. Why the
effect now to change our traditional “individual rights” theory which, on the
whole, has stood us pretty well? What experiences of inadequacy of the
present “rights” theory justify considering a change? In answer to these
contentions it must be remembered that the basic criterion in evaluating a
legal theory is whether it most correctly explains what is going on, and gives
the greatest promise of achieving the basic social goals of the society. The
following instances are preliminary suggestions that the individual rights theory
has let us down rather badly in many areas of legal development.

“Rights” and “Privileges”

We begin by recalling the creaking state of the “right-privilege” doctrine.
This dichotomy was styled to distinguish instances in which a plaintiff had a
sufficient quantum of interest from those where he did not. The classic area
concerns the problem of granting, revocation and renewal of business licenses—
whether to conduct a special type of business at a given place, or whether to
exercise a profession or occupation (such as airline pilot or truck driver)
which requires a personal license. After adverse action by administrators,
hearings were at first denied on the distinction that what was involved was
not a (property) right, but a privilege which the state was free to deny or to
bestow. Some courts, without rejecting the privilege notion, made distinc-
tions in favor of applicants when good character was brought into question.34
Others distinguished between revocation (a protected interest) and mere re-
newal (privilege).35 Others apparently had the grant of a hearing turn on
the dignity of the occupation: professional people, yes; dance halls, pool halls,
liquor shops, no.36 To still others it became apparent that whether it be
called “right,” “privilege” or “valuable privilege,” there were two distinct
elements of public interest involved: a need of immediate public protection
(e.g., an airplane pilot accused of blacking-out); and great injury to citizens
pursuing callings.37

34. Cf. Walker v. Clinton, 244 Iowa 1099, 59 N.W.2d 785 (1953) (beer license
revocation upheld—privilege); Perpente v. Moss, 293 N.Y. 325, 56 N.E.2d 726 (1944)
-license to conduct employment agency; though statute did not require hearing, where
refusal was on ground of applicant’s lack of good character, hearing was necessary).

35. See cases cited in Gilchrist v. Bierring, 234 Iowa 899, 14 N.W.2d 724 (1944),
where this odd distinction was rejected. On the other hand, Massachusetts, by stat-
ute, forbids revocation or failure to renew a license without an opportunity for a hear-

36. This classification is reported by W. GELLHORN & C. BYSE, ADMINISTRATIVE
are collected by these authors at pp. 751-69.

37. Compare Thornhill v. Kirkman, 62 So. 2d 740 (Fla. 1953) (summary suspension
As Gellhorn and Byse point out, in no event should granting or denying a hearing turn "on the ground that there is in the one case or another a mere privilege or a vested right." 38 The determination in fact rests upon the judgment as to the dominant social interest in the circumstances, and one of these interests is that "due process" accompany denying men the pursuit of a calling.

**Balancing of Interests**

A second discomfort deriving from the "individual rights" terminology is met in the clumsy "balancing of interests" test in constitutional law. A classic example of the "balancing" technique is furnished by the *Barenblatt* case, 39 in which the defendant resisted inquiries by the House Un-American Activities Committee. Justice Harlan posed the question for the majority: "Once more the Court is required to resolve the conflicting constitutional claims of congressional power and of an individual's right to resist its exercise." 40 And he answered it: "We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter . . . ." 41

Numerous criticisms have been advanced against the "balancing of interests" test. It has been said that balancing is an "inversion of the old theory that the first amendment has a *preferred* status," 42 that it leads to assumed judicial arbitrariness, and that there is frequent uncertainty as to just what is being balanced. 43 The "individual rights" theory lends itself to posing the question in terms of embattled individual and provident state. Mr.

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38. "It can be justified on the sole and urgent ground that the need of protecting the public must here override the protections that are customarily thrown around an individual who may be affected by administrative action." W. GELLMORY & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 764 (4th ed. 1960). These authors suggest, in an urgent case, immediate suspension, then a hearing, and then revocation or reinstatement.


40. *Id.* at 111.

41. *Id.* at 134.


Justice Black, an opponent of balancing, in his Barenblatt dissent formulated what I conceive to be the true interests in conflict—each of them social:

[The Court] balances the right of the Government to preserve itself, against [the defendant's] right to refrain from revealing Communist affiliations. Such a balance, however, . . . completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. . . . It is these interests of society, rather than Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be tolerated.\(^4\)

A frank recognition that it is competing social interests which are at issue will not resolve the tensions between these interests; this is still matter for decision. But correctly posing the question would forestall such formulas of decision as: "[G]overnmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy of persons . . ."\(^45\) and "to reconcile the competing claims of government and individual and to determine the propriety of the Committee's demands . . . it is an essential prerequisite . . . that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."\(^46\) It would also go far to meet the continuing contention of Mr. Justice Black (in opposition to balancing) that first amendment rights are themselves absolutes.

**Retroactivity of Constitutional Decisions**

We have already referred to the Supreme Court's last major jurisprudential effort—its justification of a prospective constitutional decision in *Linkletter*...
v. Walker and its progeny. The erratic development of the Linkletter doctrine has lent credence to suspicion of an arbitrariness of constitutional decision. Because this suspicion seems at least partly rooted in the "individual rights" theory, it is worth examining the prospectivity problem in some detail.

In 1965, in two cases in the highly controversial field where state police law enforcement clashes with asserted rights of the accused under the due process clause of the fourteenth amendment, the Court launched a new doctrine asserting its power to restrict the application of whatever novel legal rule is announced in case X to cases tried subsequent to the date when X was decided. The Court's analysis as first unfolded in Linkletter v. Walker came down to this: Since judges really "make" law and do not merely "find" it, a judicial rule may be given merely prospective effect whenever, and to the extent that, in the Court's view such a course is desirable. The Supreme Court then proposed certain criteria of desirability for "mere prospectivity" in the police law enforcement-civil rights field in Linkletter and in the Miranda series of cases which followed in 1966.

Without much concern with its historical origins, American courts from the beginning adopted the English practice of giving "retroactive effect" to new judicial decisions. But unlike the English judges, many American courts assumed a broad freedom in reversing their precedents, even interpretations they had previously given to legislative enactments. In the period between the two Wars in this century some state courts became persuaded that the practical retroactivity of decision-making in cases reversing precedent was unfair to those litigants who had depended on the earlier rule which the court felt needed judicial correction. And when the "correction" of decisional law involved a change in interpretation of a criminal statute to the disad-

47. 381 U.S. 618 (1965).
48. See Desist v. United States, 394 U.S. 244 (1969) (the new rule is to apply, beyond the winning petitioner, only to "future cases in which the proscribed official conduct has not yet occurred") citing Fuller v. Alaska, 393 U.S. 80 (1968) (the new rule is to be applied only to "those cases in which the tainted evidence has not yet been introduced at trial . . . "); DeStefano v. Woods, 392 U.S. 631 (1968); Stovall v. Denno, 388 U.S. 293 (1967). The descriptions quoted herein are from Mr. Justice Harlan's sharp criticism of the "incompatible rules and inconsistent principles" that have "characterized our efforts to apply the basic Linkletter principle." Desist v. United States, supra at 257-58. See also Jenkins v. Delaware, 395 U.S. 213 (1969), where Johnson v. New Jersey, 384 U.S. 719 (1966), was interpreted as permitting a state to omit the Miranda warnings from "post-Miranda retrials of cases originally tried prior to that decision." 395 U.S. at 213-14.
49. Miranda v. Arizona, 384 U.S. 436 (1966). The criteria as to whether a new rule will be given merely prospective effect were summarized in Johnson v. New Jersey, 384 U.S. 719 (1966): "We must look to the purpose of our new standards [rule] . . . the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application . . . ." Id. at 727.
vantage of a defendant some courts even intimated that the customary "retro-active effect" of judicial decision went against the spirit, at least, of a cherished canon of penal law, "Nulla poena sine lege."

Some of these state courts, when confronted with an unsatisfactory rule of common law or of statutory interpretation, devised a new technique: they would announce a change in the governing rule of law with respect to the future, but apply the "old" rule to litigation before them. The underlying theory was that the judge (or court) would in the instant case be applying the old rule, and merely announcing his intention to apply another rule in similar cases in the future.50

In 1932, the United States Supreme Court had occasion to reject a constitutional challenge to a state court's use of the prospective theory. At least, Mr. Justice Cardozo wrote for the Court in Sunburst,51 there is nothing found in the "due process" clause of the fourteenth amendment which prevents a state court from giving merely prospective effect to its decision, that is, applying the old rule to an instant case, while announcing a new rule of decision for the future. As to this the Constitution is silent.52 From Cardozo's discussion of the novel device it is clear that he envisaged its use chiefly in cases where reliance by a party on the old rule would make it unjust to depart from it in a given case. He did not view prospective overruling as a substitute for the traditional retrospective technique in cases where there was no marked departure from common expectations. Most clearly, the area marked out for "prospective" decision was that of a square reversal of precedent, although it was not to be rigidly confined to this situation.

Despite the impetus given it by Sunburst the new technique of "prospective" judicial decision-making did not enjoy wide vogue. One constitutional obstacle had been hurdled in Sunburst, but there remained another practical obstacle: the concern of courts that broad use of the technique of merely prospective change in a decisional rule would deprive litigants of the incentive to press appeals in cases where victory required judicial change of existing

50. Resort was first made to the new notion of "prospective overruling" in two chief categories of cases: (1) cases in which the court sought to reverse its earlier interpretation of a criminal statute, e.g., State v. Longino, 109 Miss. 125, 67 So. 902 (1915); State v. Simanton, 100 Mont. 292, 49 P.2d 981 (1935); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940); State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904); and (2) cases in which courts were intent on protecting officials who had purported to act under state statutes which the court now determined to be unconstitutional. See Note, Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions, 60 HARV. L. REV. 437, 443-44 (1947). The device was rarely resorted to in civil litigation; particularly rare was prospective overruling of decisional rules of common law. However, an exception is the Kentucky case, Mutual Life Ins. Co. v. Bryant, 296 Ky. 815, 177 S.W.2d 588 (1943).
52. "We think the federal constitution has no voice upon the subject." Id. at 364.
decisional law. Use of the “prospective” technique did not extend to the federal courts. As late as 1965 the Supreme Court itself had expressed no favorable view with respect to its use beyond the Sunburst holding that there was no barrier in the Constitution that would prevent a state court from using the “prospective” device.53

There was, furthermore, a clear negative indication from the Supreme Court that seemed to bar the use of prospective decision-making with respect to newly pronounced constitutional rules. Two cases announcing “new” constitutional rights will illuminate this point. In Griffin v. Illinois54 the Supreme Court decided for the first time that “due process” and “equal protection of the laws” required that a state furnish an indigent appellant with a transcript of the record of the case in the lower court as an essential ingredient of his right to appeal. Griffin received the accustomed retroactive benefit of the new rule. Subsequently, one Eskridge, a second wave appellant55 who had been convicted 20 years earlier in the State of Washington, claimed the benefit of the 1956 Griffin pronouncement. The Court accepted his contention that the Court in 1956 had merely given expression to a right that was inherent in the constitutional provisions when they had been originally adopted in 1868, and thus spoke from that time.56

From 1942 to 1963 the Court repeatedly maintained that the United States Constitution did not entail that defendants be given counsel in noncapital state criminal cases. The Court would, however, in this period set aside state convictions in any case in which the absence of counsel deprived the defendant, in the Court’s opinion, of a “fair trial.”57 In the celebrated Gideon case

55. We may discuss “prospectivity” of judicial decision as a two-wave affair. The first wave is the case in which the new constitutional rule is first adopted. The new rule is retroactively applied to the victorious litigant. In the second wave, i.e., collateral attack, are the closed cases. The contest here is whether one convicted earlier under a rule or practice now deemed constitutionally objectionable must be given the benefit of the “new” rule when he claims it in a habeas corpus proceeding. The consideration of res judicata, of course, ordinarily prevents litigants from reopening civil litigation once put to rest. This disability does not, however, apply to those criminal cases in which litigants invoke the extraordinary writ of habeas corpus which becomes the ordinary vehicle of the second wave.
57. Betts v. Brady, 316 U.S. 455 (1942). The Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court held that this provision was binding against the states by virtue of the “due process” clause of the fourteenth amendment. Powell was a capital case. Betts held that the Powell rule did not apply in noncapital cases; in such cases, reversal of conviction would depend on the Court’s deciding that the denial of counsel had deprived the defendant of a “fair trial.” 316 U.S. at 463-64. See gen-
in 1963 the Court abandoned the “fair trial” rule for an absolute constitutional guarantee of counsel.\textsuperscript{58} Gideon, of course, went free. The following year one Doughty, who had been convicted without counsel years before by the State of Louisiana, demanded his release, citing the Gideon rule. The Supreme Court agreed with his contention, holding, in effect, that Gideon expressed the “true” constitutional rule. The Court’s 20-year rule to the contrary was merely an aberration that it had corrected in Gideon. Those convicted under the prior (Betts) rule could now seek relief by habeas corpus proceedings in which the “true” (i.e., Gideon) rule would be given effect.\textsuperscript{59}

Thus, in the constitutional area at least, it appeared that the Supreme Court conceived itself as continually “declaring” existing law and not “making” new law. Its analysis in these cases, though not clearly articulated, seemed to assume that every litigant (not barred by res judicata) might be entitled to have applied to himself as a “right” the “correct” view of the Constitution, i.e., that view expressed by the most recent declaration of the Court “better informed.”

In Mapp v. Ohio,\textsuperscript{60} the Supreme Court frankly reversed a constitutional rule of 14 years standing. The successful first wave appellant, Miss Dolree Mapp, was discharged from custody on the strength of her appellate victory. As in Griffin and Gideon the new rule directly overruled the Court’s law on the point as it stood on the date of her trial and conviction. After Eskridge and Doughty had successfully mounted their release on the doctrines of Griffin and Gideon, respectively, another second wave appellant sought his release on the strength of the new Mapp rule. But this second wave appellant was turned down in Linkletter v. Walker,\textsuperscript{61} as a new formulation of the merely prospective overruling doctrine was adopted for the first time by the Court. Comparable failures of second wave appellants in Tehan,\textsuperscript{62} and in Johnson v. New Jersey,\textsuperscript{63} in 1966, cemented the Court’s commitment to an entirely unique doctrine that asserts general power in the Court to deny second wave retroactivity.\textsuperscript{64}

\textsuperscript{58} Gideon v. Wainwright, 372 U.S. 335.


\textsuperscript{60} 367 U.S. 643 (1961).

\textsuperscript{61} 381 U.S. 618 (1965).


\textsuperscript{63} 384 U.S. 719 (1966).

\textsuperscript{64} The subsequent history of the Linkletter doctrine has basically adhered to the Johnson formula. \textit{See} notes 49-50 supra for principal cases and variations. In Stovall v. Denno, 388 U.S. 293 (1967), a new constitutional doctrine was limited to future cases in which the proscribed official conduct had not taken place by the date of the
It is difficult to answer on any concept of individual justice the argument of Justices Black and Douglas in their dissenting opinions in *Linkletter* (renewed, by reference, in *Johnson*). They urged that the "like treatment in like cases" that is widely accepted as the most central notion of individual justice was denied to Linkletter. He had committed his offense and been tried before Miss Mapp and convicted upon the very same type of objectionable evidence. Yet she went free, and Linkletter remains in jail. Similar considerations arise as to those who had been convicted after subjection to "objectionable interrogations" like Miranda's between the date of his trial and his victory in the Supreme Court. The *Miranda* rules were held (in *Johnson*) to be unavailable to such others.

One basic cause for discontent with the *Linkletter* doctrine is removed, once we approach constitutional litigation from the standpoint of "social right." We are spared the contentions of "unfairness" on each extreme. The state will no longer be able to say to the Court: "We took you at your word on the ground rules for administration of justice. You have changed the rules in the middle of the game. We are at least entitled to have this rule made purely prospective." The individual petitioners who were tried and convicted on the basis of procedures once accepted but now deemed in violation of "due process" will no longer be able to claim "unequal" treatment if the new rule is not applied to them. A clear-cut basic proposition can then be frankly avowed: New constitutional rules, like new legislation, speak only to the future—ex-

decision fixing the new rule. The Court summarized its prevailing standards for determining retroactivity vel non: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297. In only three cases subsequent to *Johnson* does the Court appear to have made a new "right" retroactive. These were, first, Roberts v. Russell, 392 U.S. 293 (1968) in which Bruton v. United States, 391 U.S. 123 (1968) was applied retroactively. *Bruton* involved a refinement on the application of the sixth amendment right to confrontation to the states as enunciated in Pointer v. Texas, 380 U.S. 400 (1965). Second, Berger v. California, 393 U.S. 314 (1969) which concerned Barber v. Page, 390 U.S. 719 (1968), another right to confrontation case. Third, McConnell v. Rhay, 393 U.S. 2 (1968), which held retroactive Mempa v. Rhay, 389 U.S. 128 (1967), involving the right to counsel at sentencing.

65. 381 U.S. at 640.

cept for the present litigant. The only reason for granting the benefit of the
new rule to the litigant in whose case it is announced is the social interest of
fostering development of the law in light of changing times. Constitutional
rules elaborating the general terms of the Constitution are in practice the work
of courts (the amendment procedures have rarely been used). Courts only
act in response to concrete cases brought before them for decision. These
cases will not be brought unless victorious litigants may profit by the new
decision their litigation has created. Constitutional decisions are new evalua-
tions of the basic document in light of new social needs. In such decisions the
social interests in (1) stimulating litigants to press for new solutions, and (2)
protecting reliance on previously announced rules, such as in the administra-
tion of criminal justice, require vindication. What the Court in fact did in
Linkletter was to satisfy these two interests. It was prevented by the "indi-
vidual right" analysis from giving an adequate rational support to this action.

A further vice of the new prospectivity from Linkletter to Desist is that it
purports to give objective grounds for each new declaration of mere pros-
pectivity. The premise is that otherwise there may be an "individual right"
which is unjustifiably being denied. The true distinction should be between
cases which are adumbrations of earlier decisions (the latest decision being
a specification of an earlier, more general one), and cases which are clear
departures from prior law. The clearest departure is the square overthrow
of a prior doctrine, as in Mapp, despite some prior indications of "stormy
weather." It seems fair to say, as the Court there did, that Miranda was not
inevitable from Escobedo (though the point is arguable). This is not to say
that the palm of victory need always be limited to the winning litigant in the
case in which the new rule is made. Where other petitioners have already
reached the Supreme Court it is the sheerest arbitrariness, on any theory of
rights, for one to be favored and others rebuffed. The Johnson case, for rea-
sons brought into new prominence by the proposed "social right" analysis,
must surely rank with the great injustices of recent Court history. The social
interest in equal treatment surely goes this far, and the social interest in the
administration of justice would have been but slightly disadvantaged, if all
the litigants then within, if not before, the Supreme Court had been adjudged
on Miranda terms. The broad discretion given the Court in accepting
cases for hearing and in sorting out its calendar must not be exploited to justify

67. See qualification in text below to include others whose appeal is presently before
the Court.
68. The "mere adumbrations" would call for traditional "retroactive decision," a
misoner here for the Court would simply be following implicit precedent. The
"clear departures" would be merely prospective, as a rule, to be departed from in favor
of defendant only when justice clearly called for an exception.
70. Cf. Mr. Justice Douglas' exposure of the ambience of Johnson, supra note 12.
arbitrary selectivity if confidence in the constitutional process is to remain. The “social right” formulation leaves intact what seems realistic in the Link-letter doctrine, its repudiation of the fiction of required retroactivity of constitutional decision, and relieves it of the arbitrariness of its own, and subsequent, formulations. By this I mean the need to pronounce anew with each new constitutional rule whether or not it is to be retroactively applied.

III. Application of “Social Rights” Terminology

The preceding exposition is suggested as symbolic of the inadequacy of a theory of legal rights posed in terms of a dichotomy of individual and state, or society. The individual “right of property” does not loom so high in our social evaluations today as it did at the time of John Locke and our constitutional forebears. There is no reason we should be any more content with the outdated conceptual terminology that presupposed his individualistic, property-conscious political theory. The new rights we hear contended for today are sometimes phrased in the old property terminology in which Anglo-American law has been written for two centuries; but in general they are directed towards new methods of fulfilling human existence in society. Is it not then timely to shift away from a terminology of “individual rights?” We can best examine this question in the light of three asserted “rights” which are either making, or are on the verge of making, successful bids for recognition. Does the “social right” concept clarify or obscure what is happening here?

Right to Welfare

In a perceptive series of studies Professor Charles Reich of Yale Law School71 has given visibility and, many believe, persuasiveness to the notion that in a modern industrial society welfare should no longer be considered a matter of charity, or a privilege to be bestowed or taken away at will. The dignity of human personality, deformed by the handout posture, he urges, demands that society recognize both legislatively and administratively that these are “rights” of those who fall within the class of proper relief recipients. The resistance which such a doctrine has met could have been anticipated. It is rooted in the inherited concept of “individual rights.” Many citizens who are working rebel at the notion that others may claim money for nonworking as a “right.”

When we turn to the concept of a legal “right to welfare” as a “social right” the posture changes. It is no longer merely asserted that this disadvantaged

individual by virtue of being a human person has a right for society to make his way for him. This point may be true, but it is difficult to prove with empirical evidence, and the resistance to it as dogma is empirically strong. The new contention is this: The very force of social disruption and change has created a situation where large numbers of people are de facto not supporting themselves; there is no evidence that a mere will to work would change their situation on present terms. It is an interest of a society which professes concern for equal opportunity and human dignity not only to feed its hungry, but to provide conditions which are best calculated to improve the human conditions of its citizens. Human history has given a strong indication that mere charity relief will not achieve this goal. And so the society should take this new step of sparing the people who are thus disadvantaged the continued humiliation and hopelessness of contingent existence. This it may do, so the argument would go, by recognizing in these people a "right to welfare" under specified conditions. It is to the advantage of all, and not merely of the recipients, that this be done. This argument would not persuade all, but is it not a more persuasive approach to what is presently being proposed under the rubric of a "right to welfare?"

Right to Treatment

The context of an asserted "right to treatment," in the sense discussed here, is that of mental health. It has been asserted that persons who are involuntarily put in mental hospitals have a constitutional right to receive adequate treatment, or be returned to social freedom. In the District of Columbia the prevailing legislation on the rights of the mentally ill gives statutory recognition to a "right to treatment." This "right to treatment" has been given some judicial implementation by the Circuit Court of Appeals in the District of Columbia, but its precise limits are hardly clear. What kind of treatment will suffice to justify the retention of involuntary patients in a mental hospital?

The District statute provides for retention of patients who are "dangerous to themselves or others." What happens when a patient who is receiving no meaningful treatment is considered by his doctors, and the reviewing courts, as still "dangerous." In this context a court might hold that the "right to treatment" is paramount, and that those dangerous people with nontreatable mental ills are not subject to compulsory hospitalization under present law.

75. D.C. Code § 24-301(e) (1967).
To retain them is a form of subsumed preventive detention. Or a court might hold that the "dangerousness" provision overrides the individual's right to treatment. Would the same analysis govern in a situation where a patient was treatable, but the hospital was not furnishing him any treatment? Should his "individual right" now be considered weightier, as compared with "society's" interest in keeping him confined?

If this problem is viewed in the context of "social right" it would not automatically be resolved, but analysis would be more feasible. When a legislature gives the "right to treatment" to an involuntary patient, it is making the social judgment that our society puts so high a premium upon individual liberty that if a person is hospitalized, as distinct from being simply detained custodially, he should receive treatment or be released. The concept of "dangerousness" here can be understood not as the "society" side of the scales as distinguished from the individual side of "right to liberty," but rather as one of two competing social values. One of them, liberty, is easily measured. Either the individual is free, or he is confined. On the other hand, "dangerousness" is not subject to an equally ready evaluation—it is founded on an element of prediction. How reliable are the present criteria of prediction? If they are not notably high are we not faced with the phenomenon of preventive detention? And whether or not preventive detention may be constitutionally possible (another point more easily analyzed in "social right" terms), is it not a more reasonable interpretation of a statute providing expressly for a "right to treatment" with the right hand, to assume that it did not intend "preventive detention" with the left, in the absence of clear language to that effect.

In any event it becomes clear in the analysis of a "right to treatment" as a social right, that more complications exist than a simplistic view of an individual's right to be treated or be released would assume. The complications not only give ample warning of the need for legislative refinements, but give pause to those who would consider a "right to treatment" as of constitutional dimensions in the present state of the psychiatric art.

Right of Prisoners to Rehabilitation

Recently attention in legal circles has turned to a discussion of rights of convicted prisoners. A generation ago the question would have been met with

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77. See Chief Justice Burger's dissenting opinion in Cross, supra note 76, among his last on the District of Columbia Court of Appeals.
the answer that prisoners have forfeited their civil rights on conviction, loss of citizenship for felons, loss of voting rights, etc. Today we are less sure. We now know that the Constitution affords them some protections in theory. They have a right to consult counsel, to have reasonable communication by mail, not to be denied religious services of their choice, to have the help of their fellow convicts in preparing writs of habeas corpus.\textsuperscript{79} New York has held that they have a constitutional right to a hearing and counsel when an issue of fact is raised by their petition for habeas corpus;\textsuperscript{80} a "right" less certain in other jurisdictions, in practice. Issues that are gaining visibility concern the existence and dimensions of prisoners' rights with respect to mail, visitors, good time credit when transferred to mental hospitals during their sentence, treatment while in mental hospitals, and some others. One of these others which draws pained yawns in traditional circles is the suggestion that they may also have a "right to rehabilitation."

If put in terms of "individual right" or of "balancing of interests" this new claim does have an odd ring, perhaps. But can it be brushed aside with equal assurance when put in terms of vindicating a "social right?" The posture then becomes this: There is a grave social interest that steps be taken in our penal system to prevent a continuance of the obvious fact that prisons are a breeding place for crime; there is a crucial need from the standpoint of the society to provide that in the course of incarceration (penalty) the convicts be turned away from and not towards recidivism. When society is convinced that this is a necessary step, it may take corrective measures through recognizing in the convicts a "right to rehabilitation." This would allow the vindication of the "social right" or need by letting prisoners sue claiming a "right." This might be done in either of two ways—by letting them secure release or transfer from a prison in which there was no provision for rehabilitation ("treatment") or it might be done by allowing ex-convicts to sue public officials or governments for damages where this rehabilitation facility has not been provided. (This last recourse might also be had with respect to hospital detention where no "treatment" is made available.) This right might be recognized initially by the legislative process\textsuperscript{81} or it might be done by judicial interpretation. The former may be preferable in view of the novelty of the "right;" but the latter need not be excluded.\textsuperscript{82}

The chief point made in this section is not that there should or should not be a right to welfare, right to treatment, or right to rehabilitation. It is to

\textsuperscript{81} Cf. D.C. Code § 24-301 (1967).
\textsuperscript{82} Cf. Reich articles, supra note 71.
indicate that what we have before us in all these instances (and others) is not a balancing of interests of the individual versus society, but a regard for two concerns, each of which is social. One set of social interests is pressed by an individual asserting a new claim; the second set is defended by the person of the institution resisting it. In this tension of social interests the court, or the legislature, makes a judgment for or against. If the judgment is “for” we have recognition of a new social right. In the context of our previous discussion the set of social interests advanced by the individuals would be the social interest in fostering the human dignity of welfare unfortunates and encouraging their assumption of full roles in society; the social interest in not depriving mental patients of liberty where treatment is not given or available; and the social interest in so arranging our processes of institutional correction that society will not be preyed on by “crime schools” conducted at public expense. The social interests argued against acceptance of these positions would be, respectively, the social interest against encouraging malingerers and allocating funds for nonproductive persons; the social interest against risking reintroduction into society of mentally ill persons who would be dangerous to themselves or others; and the social interest against encouraging crime by “coddling criminals.” We saw earlier the legal recognition of social interests in testing the validity of activities of governmental agencies, in having free discussion of public issues, and in encouraging pressing for change of constitutional rules. In each of these cases the device of recognition of a “right” in an individual is not an upgrading of his individual interest as against the rest of society, but is simply a recognition that letting him sue on behalf of society to vindicate a “right” is the most effective way of seeing that a social interest is not just simply professed, but actively enforced.

Conclusion

It is not the design of this paper to elaborate theories on how new rights come into existence. The genesis of rights, as Rudolf von Ihering and Maurice Hauriou point out, does underscore the “battle for the right” (von Ihering) or the “risk for the right” (Hauriou) by a procession of individuals and groups. There is no discordance between their views and the contention proposed here. The moral right after battle and risk endured for its sake

83. Before the legislature, the new claim could of course be pressed by an individual, a private group, or by a governmental official or department. In the court context, it would usually be advanced by individual litigants, although through such measures as amicus curiae briefs it might be supported by these others as well.
84. See R. VON IHERING, DER KAMPF UM'S RECHT (2d ed. 1872) passim.
86. A recent example is the decade of “battles” and “risks” which preceded enactment of the Civil Rights Act of 1964.
receives social recognition; it is adopted by the society, through its official spokesmen, as its own. In this sense every legal right is a social right.

The theory of social right is most advantageously conceived in the context of a constitutional system, in which the most fundamental ideas of the organized society are broadly etched out. The American constitutional and legal development has been in the direction of a fuller consciousness and safeguard of the high social value of individual freedom and fulfillment. This is not a development which can be advantageously conceived as a series of grudging concessions by the state, or society, to the individual. The basic idea of American political and legal development has been that the purpose of organized government is to supply an environment for the fulfillment of its citizens as persons. While never achieved fully in practice, the idea has never been repudiated and inches forward toward greater realization. Through stages of limited government and positive government, the idea has remained in the foreground.

In our political and legal context it seems that recognition of all legal rights as social rights would shed greater clarity upon the role of law in our institutional system. Rights are not to be viewed as the products of banging on tables

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nor as mystical genii to be plucked from a bottle by a verifiable natural law, or by an all-knowing Court. They derive from social morality and accepted political ideals verified in constitutional development. They are tested in the crucible of public morality, of social science, and of political and legal prudence as to their likely effects. Reliable data as to psychological effects of welfare as charity, as to availability of effective treatment of mental patients and alcoholics,

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and as to stimulation of crime in merely custodial prisons, are perhaps more relevant to the questions of new rights of welfare, treatment and rehabilitation, than well-meaning over-optimism by legislatures or the courts. In the absence of such studies legislatures may hesitate, but courts must decide cases that come before them. In such instances courts may sometimes find in their role a felt need to give impetus to human dignity and freedom, as the paramount idea of the society. But consciousness that legislatures, too, have a responsibility for advancing these social values may promote more humility by constitutional courts in not second-guessing such legislatures, save where they have grossly misread given socio-constitutional values.

The analysis suggested here\[89\] is designed not to downgrade “fundamental

\[87\]. See A. Ross, On Law and Justice 274 (1959): “to invoke justice is the same thing as banging on the table.”


\[89\]. The analysis proposed here is anything but new. In today’s jurisprudential categories it is most closely approached by the sociological jurists. Jurisprudence buffs
freedoms," but to provoke a more realistic, and therefore better, understanding of these freedoms and of the human dignity that they presuppose and foster. Some may contend the effect of this analysis would be otherwise. Fiat lux!

will detect resonances from Eugen Ehrlich, Rudolf von Ihering, Heck's interesse-jurisprudenz, François Geny, Léon Duguit, the French Institutionalists, and some strains of Benjamin Cardozo, Roscoe Pound and Karl Llewellyn. For general orientation of these jurists, see W. Friedmann, Legal Theory chs. 17, 18, 23-25 (4th ed. 1960). But the key that unlocks the door, I believe, is contained in the almost offhand comment of John Chipman Gray, "According to an old saying, everybody is born either a nominalist or a realist." J. Gray, The Nature and Sources of the Law 52 (1909).