
Judicial Activism and the Concept of Rights

When President Clinton made his first Supreme Court appointment last summer, he chose someone with a decidedly centrist view of the judiciary's role in American society. Nonetheless, on the first day of Ruth Bader Ginsburg's confirmation hearings, a number of Senate Republicans expressed concern that her nomination might signal a return to the "judicial activism" of the recent past. Senator Orrin Hatch took up the theme with these cautionary words:

Under our system, a Supreme Court justice should interpret the law, and not legislate his or her own policy preference from the bench. The role of the judicial branch is to enforce the provisions of the Constitution and laws we enact in Congress as their meaning was originally intended by the framers. Any other philosophy of judging requires unelected Federal judges to impose their own personal views on the American people in the guise of construing the Constitution and Federal statutes.

There is no way around this conclusion. Such an approach is judicial activism, plain and simple, and it is wrong, whether it comes from the political left, or whether it comes from the political right.

It does not seem to me, as it does to Senator Hatch, that there are only two philosophies of judging — that one must be either a strict constructionist or, by default, a freewheeling judicial activist. That dichotomy by no means exhausts the possible strategies and shadings of constitutional interpretation. For the moment, however, there is a second feature of his argument that interests me more. Although he condemned judicial activism *per se*, the Senator's account of its consequences focused chiefly on the rulings of liberal jurists over the past thirty years. "Since the advent of the Warren Court," he declared, "judicial activism has resulted in the elevation of the rights of criminals and criminal suspects, and the concomitant strengthening of the criminal forces against the police forces of our country." It has also led, he argued, to reverse discrimination, "prayer being chased out of the schools, and the courts creating out of thin air a constitutional right to abortion on demand."

Now the social issues invoked by this list — desegregation, the rights of criminals, school prayer, and abortion — have sharply divided liberals and conservatives for nearly three decades. And for much of this time, conservative theorists have criticized the key judicial decisions in these areas by accusing the Warren Court and subsequent liberal judges of reading their own views into the Constitution and usurping the powers of the executive and legislative branches. For polemical purposes, the phrase "judicial activism" has thus become a code word for judicial protection and promotion of social engineering, left-wing protest, crime on the streets, atheism, and sexual promiscuity.

Conservative theorists have accused the Warren Court and subsequent liberal judges of reading their own views into the Constitution and usurping the powers of the executive and legislative branches.

This characterization of the Warren Court and its legacy, however, is deeply mistaken. The Court's lasting significance does not lie in its supposed expansion of the judicial role, or even in the specific decisions to which Senator Hatch objects. Rather, its significance lies in a seemingly abstract issue of jurisprudence: the nature of a legal right. Each of the Warren Court's controversial decisions proceeded from a self-conscious and sophisticated understanding of the manner and scope of rights protection. My purpose here is to explain and defend that understanding.

Two Concepts of Rights Protection

Philosophers and legal scholars have offered various definitions of a right, but all agree that rights are values of particular importance and that their protection is a central aim of public institutions. For this reason, the question of what it takes to secure rights is a cen-



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tral question facing any political and legal theory that includes the concept of rights in its vocabulary.

According to one common understanding, rights are protected *reactively*: an individual whose rights have been infringed may seek satisfaction of some sort after the fact, either in the form of compensation or from punishment of the infringer. For example, prior to the Warren Court's decision in *Mapp v. Ohio* (1961), 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, but the illegally seized evidence could still be used at trial.

The Warren Court criticized this entire approach to rights protection on the grounds that reactive remedies, such as "aroused public opinion and internal police discipline," had proved to be "without deterrent value." In their place, the Court adopted the exclusionary rule, which forbids introducing illegally seized evidence at trial, as a more effective way of deterring police misconduct.

The exclusionary rule differs from the remedies available before *Mapp* in that it protects rights *prospec-*

tively, not reactively. That is to say, by preventing the state from introducing illegally seized evidence at trial, it removes *in advance* much of the incentive for the Nasty Boys to batter down one's door at 5 o'clock in the morning. Analogously, by ruling that suspects' statements to police are inadmissible in court unless those suspects have been advised of their right to counsel and their right to remain silent, the Warren Court in the *Miranda* case minimized in advance the possibility of grueling interrogations and coerced confessions. Without such protections, the Court believed, victims of police overreaching are given over to the tender mercies of the tort system or the police discipline system for redress of the violation of their rights.

It is too easily forgotten that before the Warren Court criminal procedure cases, police departments (particularly in rural areas) often consisted of poorly trained, poorly screened goons. In the early 1960s, as Richard Neely observes, suspects were "routinely picked up off the street without a warrant" and subjected to interrogations that frequently involved "humiliating insults and a good deal of slapping

around." Nor were local officials likely to provide redress — not when politicians were eager to impress the electorate with their determination to "crack down on crime," and when judges were often the allies and personal friends of sheriffs and police chiefs.

After the criminal procedure cases, however, municipalities suddenly discovered that the badly trained muscleheads in their police departments 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 considerable political heat down on prosecutors and police chiefs. The result was a transformation of police departments into better-trained, better-educated, more professional organizations that relied more on finesse and less on force in conducting investigations. The prospective protections of rights established by the Warren Court created ripple effects leading to further and better prospective protections.

In the aftermath of the Rodney King beating case, as well as thousands of less publicized instances of police brutality, it is obvious that police departments still include a number of sadists, racists, and fascists who have nothing but contempt for procedural niceties and even for basic human rights. Yet this fact, which might appear to cast doubt on the effectiveness of the Warren Court's prospective approach in criminal procedure cases, demonstrates only that the Court's successors erred in declining to extend its approach from the context of investigation to those of arrest and ordinary patrolling.

When the ordinary working of institutions creates typical, persistent, and chronic threats to our rights, we have a derivative constitutional right to have the threats dissolved.

In 1983, for example, in *City of Los Angeles v. Lyons*, the Supreme Court heard the case of a 24-year-old black man who had been stopped by Los Angeles police because of a burned-out taillight on his car. Mr. Lyons was searched, beaten on the head, and choked until he blacked out. In subsequent legal action, he asked not only for damages — a reactive remedy — but also for an injunction forbidding the police from using choke holds in the future against suspects not threatening violence — a prospective remedy. Although the Court agreed that Mr. Lyons could sue for damages, it denied him standing in seeking the injunction. If the Court had adopted a prospective

rather than a reactive conception of rights, it would have decided the case differently, with practical consequences for the prevention of police brutality about which one can only speculate.

Safeguards against a "Standard Threat"

As a general principle, the Warren Court insisted that to enjoy meaningful protection, and thus to count as rights at all, primary constitutional rights must often be hedged about with derivative, prophylactic rights designed to forestall infringements before they happen. This is not to say that *every* right must be protected by this strategy; in many cases, reactive remedies will suffice. Prospective protection is required principally when a rights violation is part of an institutional pattern. To understand why, let me introduce a concept from Henry Shue's analysis of rights — the concept of a "standard threat."

The ordinary working of institutions often creates typical, persistent, and chronic threats to our rights. When officers from a poorly disciplined police force brutally interrogate a suspect, or when segregationist institutions violate the rights of blacks, it is clear that we are not confronting isolated incidents or the actions of a single misguided official. Rather, we are confronting the predictable effect of an institutional cause — a standard threat. And it is principally in cases of standard threats that we have a derivative constitutional right to have the threat dissolved.

There is a simple reason why this right to prospective protection is limited to forms of standard threat: the world is so chock-full of non-standard threats that it would be virtually impossible to protect us against them prospectively. To anticipate and guard against the full range of non-standard threats would require an omnipresent, omnipotent, omni-intrusive, and omni-expensive government that had abandoned all activities except one: the spinning out of improbable right-threatening scenarios that must be warded off. It makes more sense, therefore, to leave the unusual rights violations to a system of purely reactive remedies. Only the standard threats need be guarded against in advance. And thus both prospective and reactive approaches to rights protection have a place in a system of rights.

It is important to see, however, that the two strategies differ markedly in their understanding of the manner and scope of rights protection. Reactivists deny that rights by their nature demand protection from merely potential infringements. Such a premise, they argue, amounts to a presumption that public officials, given half a chance, will violate the Constitution. Instead, reactivist opponents insist, we should presume — pending decisive evidence to the contrary — that officials will respect constitutional rights, and that those who fail to do so are mavericks, single "rotten

apples," rather than typical members of an untrustworthy system.

Prospectivists, in contrast, tend to entertain suspicions about the government and the authorities. They are willing to scrutinize powerful institutions in order to see whether 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 prospectivist outlook is an anti-authoritarian tilt coupled with a penchant for considering social and structural explanations for rights violations.

It is, I believe, this double tendency of the Warren Court's prospectivist account of rights protection — toward anti-authoritarianism and toward structural explanations — that draws down the wrath of conservative theorists, just as the particular results the Court achieved draw down the wrath of conservative politicians. If this is true, then the fundamental divide between the Warren Court and its critics has to do not with the clash between judicial activism and judicial

restraint, but rather with the difference between prospectivist and reactivist approaches to the securing of rights. When Senator Hatch argues otherwise, he misconstrues the Warren Court decisions and actions that he opposes. The restructuring of institutions in order to abolish racial segregation "root and branch," the Court-approved judicial takeover of prisons and mental hospitals that abused and tormented 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 these may be best understood not as instances of judicial activism, but as prospective protections of constitutional rights. They grew out of the Court's belief that primary constitutional rights create derivative, or secondary, rights whose purpose is to forestall standard threats to those primary rights.

The Example of Privacy

Having presented the Warren Court's prospectivist credentials, I can now offer two qualifications of my argument. First, not all conservative theorists reject the prospectivist approach to rights protection, nor do all critics of the Warren Court fail to acknowledge its commitment to that approach as the basis for its controversial decisions. Second, and perhaps more important, not all of the Warren Court's expansions of rights can be explained as prospectivist protections of primary rights. Take the Court's famous finding of a general right to privacy, in the 1965 case *Griswold v. Connecticut*.

The *Griswold* decision struck down a Connecticut statute forbidding the sale and use of contraceptives; it held that the statute violated a right to privacy implicit in the First, Third, Fourth, Fifth, and Ninth Amendments. Now, none of these amendments in fact mentions privacy, and none has anything to do with contraception — let alone cohabitation or copulation. Nevertheless, in the key passage of the *Griswold* opinion, Justice William O. Douglas argued that these amendments provide grounds for believing that the Constitution guarantees a general right of privacy. His metaphorical language has since become a source of bewilderment for law students and an object of ridicule in law school faculty lounges:

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

There are at least two ways of understanding this passage. The first is to read it as a restatement of the prospectivist view, asserting that the specific guarantees in the Constitution create derivative, secondary,

Legal Modernism

David Luban

Modernism in legal theory is no different from modernism in the arts: each responds to cultural crisis, a sense that institutions and traditions have lost their validity.

In his new book, legal philosopher David Luban argues that pragmatism, traditionalism, and nihilism are each a flawed response to the modernist predicament. Invoking Walter Benjamin's reflections on narrative and historical consciousness, he explores the nature of justice by analyzing Martin Luther King, Jr.'s "Letter from the Birmingham Jail," the Nuremberg trials, and trial scenes in Homer, Hesiod, and Aeschylus. With these examples, Professor Luban articulates several of the tensions that motivate contemporary legal theory — tensions between order and justice, obedience and resistance, statism and communitarianism.

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or what Douglas here calls “penumbral” rights. Commentators who adopt this reading assume that wherever Justice Douglas mentions “guarantees,” he is referring (as he does in the opening phrase) to *specific guarantees explicitly stated in the Constitution* as the source of these penumbral rights. This is Robert Bork’s assumption, for example, when he observes,

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 . . . [and] then asserted that other amendments create “zones of privacy.”

Perhaps surprisingly, Judge Bork has no objection to the idea of penumbral rights; though he finds Justice Douglas’s terminology “exceptional,” he accepts the theory itself. He’s a prospectivist.

However, Judge Bork does not accept the idea, which he also finds in *Griswold*, that the specific privacy rights emanating from various amendments can somehow fuse and create a general, freestanding privacy right — one that exists on an equal footing with the explicit guarantees of the Bill of Rights and is capable of independent growth and development. According to his account of *Griswold*, the Warren Court came to assert the existence of such a privacy right in two steps. First, it inferred penumbral rights of privacy from explicit constitutional guarantees. Then it fused these various penumbral rights into a general right of privacy. The first step, Judge Bork argues, is sound; but the second is not. Rights of specific and limited scope do not magically “fuse” into general, unlimited rights.

As lucid as it is, this account of the Warren Court’s logic in *Griswold* seems to me dead wrong. To see why, we need only examine one of the amendments that Justice Douglas invokes in asserting the right to privacy. I suggest the Third: “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.” If the Warren Court had indeed taken the prospectivist approach in asserting the right to privacy, it would have said that this right derives (or emanates) from the Third Amendment — that the right to privacy is a secondary right protecting our primary constitutional right to exclude soldiers from our homes.

Yet a moment’s thought tells us that the relationship between the two rights only makes sense the other way around. A right to privacy, after all, cannot afford any greater protection — cannot exclude soldiers from our homes any more effectively — than does the Third Amendment itself. On the other hand, the Third Amendment *can* help protect the relevant right to privacy — that is, privacy in our own home. Obviously, having a platoon of soldiers billeted in the basement

would put a damper on the intimate activities of the household. By forbidding the government from installing infantry in the house, the Third Amendment prospectively wards off what might otherwise become a standard threat to privacy.

The Third Amendment thus belongs to the penumbra of the right to privacy, not the other way around. Similarly with the Fourth Amendment right against illegal searches and the Fifth Amendment right against compelled self-incrimination: all of these rights are penumbral rights, derived from our right to privacy understood as a prospective protection against standard threats from the government. In each instance, it is by examining the specific guarantees in the Constitution that we discover and articulate the general guarantees (such as the right to privacy) they are established in order to defend.

At this point, let us return to the key passage from *Griswold*. Our first reading of the passage assumed that all the “guarantees” mentioned in it are *specific and explicit guarantees* understood as the source of penumbral rights. But a second, more plausible reading, proposed by Richard Mohr, argues that the opinion also invokes *general and implicit guarantees*. In the crucial sentence from *Griswold*, it is precisely these general guarantees that help give the specific guarantees “life and substance,” providing the motive and justification for those rights enumerated in the Constitution. In Justice Douglas’s view, the specific textual rights are best interpreted as protections of an unenumerated general right of privacy against a handful of standard threats anticipated by the framers. And once we come to recognize the right to privacy as a principle giving specific textual rights “life and substance,” we may proceed to consider whether contraception, for example, is protected by that right of privacy without attaching the question to any specific enumerated right.

The Human Goods that Rights Secure

There is more to say about the process by which we reason about and identify general guarantees. For this purpose, we may find an illuminating analogy in another area of the law of privacy — the testimonial privileges. These are rights to prevent persons in whom we confide from testifying against us in court, or to refuse to testify against persons who have confided in us. The common law recognized such privileges protecting communication between attorney and client, physician and patient, priest and penitent, and husband and wife. (The privilege against self-incrimination is also a testimonial privilege; while the others protect communication between two parties, the privilege against self-incrimination preserves the sanctity of one’s own thoughts, one’s relation to oneself in inner dialogue.)

The testimonial privileges are best thought of as prospective protections of our right to enjoy confidential relationships with our attorneys, our doctors, our clergymen, our spouses, and even ourselves. The question then arises: "Why just these?" And in turn, how this question is answered determines whether courts and legislatures should extend the privileges to other relationships. The physician-patient privilege, for example, has been extended to psychologists and counselors; the spousal privilege has been extended in three states to parents and children; and several jurisdictions have established accountant-client privileges. What principle is involved? Should the testimonial privilege be extended to financial planners? Insurance salesmen, who often receive sensitive financial information from their customers? Grandparents? Unmarried lovers? Best friends?

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To answer these and similar questions, one needs some sense of what makes the five original relationships especially important. I suggest that these relationships correspond to five fundamental aspects of the human personality. I am, first of all, a self engaged in my own inner dialogue — a dialogue essential to my integrity. Hence the right against self-incrimination. Second, I am a physical body subject to all the infirmities and corruptions of the flesh. Hence, the right to speak confidentially with my doctors. Third, 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. Fourth, I am a moral and spiritual being, with a soul to tend and a burden of guilt that must be given voice. Hence, the priest-penitent privilege. Fifth, I am a citizen, a juridical person living in a network of public rights and relationships that are fragile and shifting and hard to understand. Hence, the attorney-client privilege. Thus, we find that the 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 laws granting testimonial privileges, then, we must view these privileges as penumbral protections of the five privileged relationships; and these, in turn, we best regard as themselves penumbral protections of five fundamental aspects of

human existence. The relationships "emanate" from these basic aspects of existence, and the privileges "emanate" from the relationships. Such an analysis allows us to understand what it means to regard a piece of positive law in such a way as to glimpse a more general principle that helps give it "life and substance."

In much the same way, we would begin an analysis of the Third Amendment by asking what is so burdensome about quartering soldiers in one's home. This question directs us to what is valuable about a home. The 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. (Of all the horrors of homelessness, the permanent lack of privacy is surely among the worst.) Our inquiry into the Third Amendment directs our vision to the importance of private activities to a decent life. The analysis leads us from the positive law to the basic values it embodies.

The Warren Court's Legacy

When we join this way of viewing legal rights with the prospectivist approach, we can appreciate the full magnitude of the Warren Court's contribution to the theory of rights, particularly constitutional rights. The Court began with specific textual rights, and then proceeded to elaborate them simultaneously in opposite directions: first, reasoning from these rights "down the line" to the secondary rights that must be put in place in order to secure them from standard threats; second, reasoning from these rights "up the line" to the values that the textual rights were themselves put in place to protect against standard threats. In doing so, 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. At this moment in our legal history, when the Supreme Court has convened for the first time in forty years without a member of the Warren Court seated among the Justices, this is a legacy worth recalling accurately.

— David Luban

Sources: The New York Times (July 20, 1993); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); Richard Neely, *How Courts Govern America* (Yale University Press, 1981); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980); *Griswold v. Connecticut*, 381 U.S. 479 (1965); Robert H. Bork, *The Tempting of America* (The Free Press, 1990); Richard D. Mohr, *Gays/Justice* (Columbia University Press, 1988).