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# CJL 4064: Individual Rights in the Criminal Justice System

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# What are “rights”?

- Rights can be thought of in at least four ways:
  - Rights as privileges
    - This is the right to do certain things
      - E.g., you have the right (privilege) to pick up shells on the beach if it is not against the law
        - » You have no duty *not* to pick up shells
  - Rights as claims
    - This is the right *to* something from another person
      - E.g., you have the right (claim) to be paid wages according to your employment contract
        - » Someone else has a *duty* toward you
  - Rights as powers
    - This is the right to *create* new claims or privileges
      - E.g., A ship captain has the right (power) to impose duties on the crew (i.e., claim)
      - E.g., A property owner has the right (power) to allow someone into their home (i.e., a privilege)
  - Rights as immunities
    - This is the right for certain claims not to be imposed on you
      - E.g., some government agents have the right (immunity) not to be sued
        - » This means that the people do not have the right (claim) to sue them



# History of “rights”

- The concept of “right” precedes the concept of “a right”
  - Ancient philosophers would argue about “what is right” (i.e., just)
    - But they did not discuss individual liberty or individual rights
- The modern sense of “a right” goes back to late Middle Ages
  - E.g., William of Ockham (14<sup>th</sup> century) and John Locke (17<sup>th</sup> century)
    - Some argue that there are some classical Roman jurists use terminology similar to “rights” as early as the first century BCE



# Rights and freedom

- Isaiah Berlin famously argued that there were two basic ways to think about freedom/liberty:
  - Negative liberty
    - Freedom *from* interference by others
      - “I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is imply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree, and if this area is contracted by other men beyond a certain minimum, I can be described as coerced, or, it may be, enslaved.”
        - » But “if I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human being within the area in which I could otherwise act.” (Berlin, 1969)
  - Positive liberty
    - Freedom in “being one’s own master”
      - “I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s, acts of will. I wish to be a subject, not an object.”
        - » “I wish to be somebody, not nobody; a doer—deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing the human role, that is, of conceiving goals and policies of my own and realizing them.”



# Two concepts of rights

- Negative rights
  - Rights for life, liberty, and property not to be interfered with by others
    - This conception of rights follows from “negative liberty”
      - Since we have the *freedom* to be left alone by others, it violates our *rights* when they do so
        - » Negative rights impose duties on others not to interfere with our rights
  - Most constitutional rights are negative rights
    - E.g.,
      - Right to free speech means that government cannot prohibit your speech
        - » But it does not mean that government has to provide you with a loudspeaker!
      - Right to keep and bears arms means that government cannot prohibit gun ownership
        - » But it does not mean that government has to provide you with guns!
- Positive rights
  - Rights to some kind of entitlements
    - This conception of rights follows from “positive liberty”
      - Since *freedom* requires some basic entitlements, we have *rights* to those things
        - » Positive rights impose duties on others to provide entitlements
  - Some constitutional rights are positive rights
    - E.g., the right to an attorney (for criminal defendant)
      - The government must *provide* the defendant with the attorney



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# ORIGINS OF THE BILL OF RIGHTS



# The Rights of Englishmen

- Early recognition of rights in Magna Carta
  - Royal charter agreed to by King John of England on June 15, 1215
    - The charter was an agreement between the King and a group of rebel barons, and mostly included rules for the King's feudal rights over the barons (e.g., taxation, regulation)
  - The charter also guaranteed protection of certain rights, most importantly the protection of legal due process
    - “No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”
  - The charter mostly involved the rights of barons
    - But the idea of “ancient English rights” delineated in the Magna Carta became important in the 17<sup>th</sup> century
- English Bill of Rights in 1689
  - Following the Glorious Revolution in 1688, the English Bill of Rights 1689 set out the powers of the monarch and the rights of Parliament
    - This included free elections and freedom of speech in Parliament
  - The Bill of Rights also included some civil rights
    - E.g., no excessive bail, excessive fines, nor cruel and unusual punishments



# Hobbesian state of nature

- In *Leviathan* (1651), English philosopher Thomas Hobbes argued that there was no natural law or natural rights
  - “During the time men live without a common power to keep them all in awe, they are in that condition which is called war”
    - “In such a condition there is no place for industry...no culture...no navigation...no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death;”
      - “and the life of man, **solitary, poor, nasty, brutish, and short...**”
  - “To this war of every man against every man...nothing can be unjust.”
    - “The notions of right and wrong, justice and injustice, have there no place.”
      - “Where there is no common power, there is not law; Where no law, no injustice.”
- Rights are something the government *creates*
  - We can call these “positive rights” or “legal rights” in contrast to “natural rights”





# Lockean state of nature

- In his *Second Treatise of Government* (1690), English philosopher John Locke argued that there *was* natural law and natural rights prior to government
  - “we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.”
    - “But though this be a state of liberty, yet it is not a state of license....The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”
      - “the execution of the law of nature is, in that state, put into every man’s hands”
  - “Civil government is the proper remedy for the inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case”
    - “absolute monarchs are but men; and if government is to be the remedy of those evils, which necessarily follow from men’s being judges in their own cases, and the state of nature is therefore not to be endured, I desire to know what kind of government that is, and how much better it is than the state of nature.”
- The framers of the Constitution were influenced by Locke
  - The point of government was to protect natural rights to life, liberty, and property
    - “First rights, then government to protect those rights”



# The Declaration of Independence (1776)

- “When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”
  - Here, Jefferson says that there are “laws of nature” and that a people—such as the American colonists—can dissolve their social contract with England
- “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”
  - Here, in the most famous sentence, Jefferson declares that there are natural *rights* that cannot be given up but are always retained by individuals.
    - Of course, it would take hundreds of years for this to come true
      - Martin Luther King, Jr. called it a “promissory note” that a later generation had come to collect
- “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”
  - The purpose of the government is to protect natural rights, and the just powers of government are based in popular sovereignty
    - First comes rights, then comes government



# The Declaration of Independence (1776)

- “That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”
  - The people have a right to alter or abolish a government that fails to protect natural rights
- “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”
  - But abolishing government should be done cautiously and not for “light and transient causes”
    - All governments will violate individual rights some of the time, but this is not sufficient for blowing the whole thing up!
- “But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.”
  - Revolution is justified only if there “is a long train of abuses and usurpations, pursuing invariably the same Object”—evidence of what amounts to an actual criminal conspiracy by the government against the rights of the people
- “Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.”
  - Jefferson then recounts a long list of abuses by King George III
    - The American Revolution would follow, leading to the independence of the American colonies (now States) in 1783



# Republicanism and popular sovereignty

- Following the revolution against the English monarchy, states became *republics*
  - “For most Americans, this was the deeply felt meaning of the Revolution: they had created a new world, a republican world” (Gordon Wood, 1969)
- A republic is a form of government where the rulers are wise and virtuous representatives of the people
  - “In a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.” (Madison, *Federalist* 14)
    - In late 18<sup>th</sup> century, democracy was considered a form of majoritarian tyranny, where the less virtuous (and property-less) majority might violate the rights of the more virtuous (and property-holding) minority



# Federalists vs. Anti-federalists

- Following the American Revolution, the major political debate was between the federalists and the anti-federalists
  - Federalists desired to create a federal system with a strong national government along with the existing 13 state governments
    - Anti-federalists feared the power of a strong national government and wanted to retain state sovereignty



# The problem

- “If men were angels, no government would be necessary”
  - A major purpose of government is to deal with the fact that some citizens will not respect the rights of others
- “If angels were to govern men, neither external nor internal controls on government would be necessary”
  - But we cannot assume that government is run by Plato’s “philosopher kings,” who always do what is right and just
- The problem is “framing a government which is to be administered by men over men”
  - “you must first enable the government to control the governed; and in the next place oblige it to control itself” (Madison, *Federalist* 51)



# The solution

- A *national* government with enumerated powers
  - The United States is a **federal** system
    - Separation of powers between national (i.e., federal) system and state systems
      - “The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which remain in the State governments are numerous and indefinite” (Madison, Federalist #45)
  - States have plenary (unenumerated) powers
    - States have broad powers to pass laws (i.e., police powers)
- The U.S. Constitution provides enumerated powers
  - A constitution limits what lawmakers can do
    - Even majority cannot overrule constitutional rules
      - Typically requires “direct action of the whole people” to change
        - » In practice, requires supermajority to amend (3/4 of states in U.S.)



# U.S. Constitution (1788)

- Article 1
  - Sets up and defines legislative power (Congress)
- Article 2
  - Sets up and defines executive power (President)
- Article 3
  - Sets up and defines judicial power (SCOTUS)
- Article 4
  - Defines powers and limitations of States
- Article 5
  - Defines amendment process
- Article 6
  - States that Constitution is the “supreme Law of the Land,” requires oaths to support Constitution, no religious tests
- Article 7
  - How to ratify this Constitution (requires 9/12 States)
    - RI did not participate
- But what protects individual rights?





# The debate over the Bill of Rights

- Federalists objected to a Bill of Rights on the grounds that it would imply that *only* enumerated rights were protected
  - “In a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but ... highly imprudent.”
    - “If we attempt an enumeration, every thing that is not enumerated is presumed to be given.”
      - “Enumerate all the rights of men! I am sure, sir, that no gentlemen in the late Convention would have attempted such a thing.” (James Wilson, 1787)
  - “It would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up;”
    - “...because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation;”
      - “and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.” (James Iredell, 1788)



# The debate over the Bill of Rights

- Anti-federalists argued that there needed to be an enumeration of fundamental natural rights in order to prevent the new federal government from becoming tyrannical
  - “The common good...is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in order that what remained should be preserved.”
    - “But it is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc.”
      - “From these observations it appears, that in forming a government on its true principles, the foundation should be laid...by expressly reserving to the people such of their essential rights as are not necessary to be parted with.” (Brutus II, 1787)
- James Madison thought that a Bill of Rights was an easy compromise with the Anti-Federalists in order to preserve the new federal government
  - “I believe that the great mass of the people who opposed [the United States Constitution] disliked it because it did not contain effectual provision against encroachments on particular rights”
    - “I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door was opened, if we should be very likely to stop at that point which would be safe to the government itself”
      - “But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights”



# Bill of Rights

- The first ten amendments to the U.S. Constitution were ratified in 1791
  - Rights to freedom of speech; freedom of press; free exercise of religion; and freedom of assembly (1<sup>st</sup>)
  - Right to keep and bear arms (2<sup>nd</sup>)
  - Right against soldiers quartered in private homes (3<sup>rd</sup>)
  - Right against unreasonable searches and seizures (4<sup>th</sup>)
  - Rights to due process; grand jury; against double jeopardy; against self-incrimination (5<sup>th</sup>)
  - Rights to speedy, public trial with jury of impartial peers; notice of charges against accused; confrontation of witnesses against accused; compulsory process to obtain witnesses in favor of accused; and defense counsel (6<sup>th</sup>)
  - Right to trial by jury in civil lawsuits (7<sup>th</sup>)
  - Right against excessive bail; excessive fines; and cruel and unusual punishments (8<sup>th</sup>)
  - Rights not enumerated “shall not be construed to deny or disparage others retained by the people” (9<sup>th</sup>)
  - Powers not delegated to United States (i.e., unenumerated powers) are reserved to the States (10<sup>th</sup>)
- As of 1992, there are 27 amendments to the U.S. Constitution
  - The first ten amendments were not commonly referred to as “Bill of Rights” until 20<sup>th</sup> century



# Limited scope of Bill of Rights

- In *Barron v. Baltimore* (1833), SCOTUS held that the rights in the first ten amendments did not apply to the states
  - “The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”
    - “Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.”
      - “These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.”
        - » “These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”