ARTICLE

A Natural Rights Basis for Substantive Due Process of Law in U.S. Jurisprudence

JAMES F. ROSS

*Professor of Philosophy, University of Pennsylvania, Philadelphia, Member of Pennsylvania Bar.**

INTRODUCTION

The Problems One of the salient features of the American constitutional republic is that under its Constitution certain interests of individual persons are *specially* protected from governmental intrusion; that is, the government must be acting from a "compelling public interest" rather than merely for a "legitimate public objective" in order for intrusion upon such individual self-determination to be constitutionally permissible. The specially protected individual interests are called "fundamental liberties." But what determines which individual interests are thus protected?

Over several decades the trend of Supreme Court decisions has been that the fundamental liberties are not restricted to those interests explicitly mentioned ("enumerated") in the amendments to the Constitution (e.g., a woman's right to bear or not bear a child). That, of course, raises the question as to what is the *basis* or *criterion* by which an individual's interests (say in sexual self-determination) come to be specially protected or "fundamental."

The *legal* problem with the due process clause of the Fourteenth Amendment[1] is to identify fundamental liberty, as against "ordinary" liberty,[2]

*This research was undertaken while the author was a member and NEH Fellow of the Institute for Advanced Study, Princeton, N.J., 1975–76.

1. U.S. Constitution, Amendment 14, Sec. 1: "Nor shall any state deprive any person of life, liberty or property without due process of law." This paper is entirely restricted to the substantive liberties which are protected as fundamental by this clause and does not touch upon procedural matters.
2. There is no constitutional category of "ordinary" liberty, by that name; rather all liberties that are not classified as "fundamental" are classified only as "not fundamental." Nevertheless, the idea of "ordinary" liberty should be clear enough in this context; it is liberty that may be governmentally invaded provided the Reasonableness Principle is satisfied. See below.

UNIVERSAL HUMAN RIGHTS, Vol. 2, No. 2, Apr-June 1980

and to identify those compelling governmental interests[3] that alone justify the invasion of fundamental liberty.

The *philosophical* problem I address is to provide a "natural morality" account of fundamental constitutional liberty and of compelling governmental interests,[4] which can assist in the legal identification of such liberties and escapes Justice Black's criticism that "natural law due process philosophy" is merely a license for judges to substitute their private moral prejudices for the more competent judgments of legislators.[5]

In developing some principles to serve as a "natural moral" basis for due process of law thinking, I *reverse* the way due process theory is usually described; that is, I construct a Mirror Image of traditional due process analysis in order to delineate the skeleton of natural morality upon which the constitutional doctrine of substantive due process protection really rests.

There are other, complementary ways to identify specially protected individual interests, though they do not always yield exactly the same results as mine. For instance, David A. J. Richards, *The Moral Criticism of Law,*[6] applies his revisions of Rawls's two principles of distributive justice to conclude that adult consenting homosexuality is a fundamental liberty and that "public offence," alone, is not a serious enough consideration to justify the invasion of individual liberty. The effect of Richards's analysis is similar to mine but the natural law considerations are somewhat differently emphasized and Richards does not base the difference in kinds of liberty upon any particular feature of the *process* of forming a constitutional republic or upon any hypothetical state of liberty prior to the forming of a government.

My account, of course, differs from the "libertarian" views epitomized by Robert Nozick in his book, *Anarchy, State, and Utopia,*[7] because I accept the premise of constitutional law that *every* individual substantive liberty is, in principle at least, subject to coercive governmental invasion (even life, liberty, and property) and that all liberty that is not specially protected in the formation of a government may be invaded by the government for the public welfare and infringed for less serious reasons than one individual would have to have for coercively invading the life, liberty, and property of another person. Thus there is a crucial difference between a contract theory of the State that is *not* a "compromise of natural liberty" theory (Nozick's) and one that *is* (mine).

Although important recent literature supports the natural rights doctrine (e.g., Wasserstrom's),[8] none of the natural rights theorizing has been applied specifically to the constitutional issue of identifying fundamental liberties, despite Justice Black's specific challenge that court majorities were engaging in a kind of natural law philosophy.

Ronald Dworkin's influential book, *Taking Rights Seriously,*[9] explains the crucial role that individual human rights play in determining the law by introducing the "trumps" metaphor, whereby the assertion of the individual's interest "trumps" the government's assertion of the collective goal and "entitles" the individual to a judicial decision in his favor. Yet there is no systematic recognition of the American constitutional issue of *how* to distinguish specially protected rights from "ordinary" ones that do not "trump" legitimate public interests that are less than "compelling." And there is no theory at all of the *origin* of those moral and political interests or theory of the way they function in constitutional law.

So, this paper applies to the constitutional problem of how to identify fundamental liberties certain natural law considerations that are recognized by recent philosophers and lawyers to be worth reexamining.

Finally, I develop the natural law—natural interests approach, rather than the Rawls principles-of-justice approach, because I think the cultural and historical relativity of what are thought to be *basic* and uncompromisable human liberties (as distinct from legitimate but not uncompromisable human interests) may open a path to a theoretical reconciliation of the three views of human rights expressed in the Universal Declaration of Human Rights and the elaborating documents. (That matter will be pursued in a subsequent paper.)

Traditional Due Process Theory Three principles (with certain qualifications, omitted for simplicity)[10] characterize substantive due process of

3. "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960). Traditional due process analysis does not contain an account of what it is for a legitimate state interest to be compelling. Usually, cases involve a decision that such an interest is *not* present and, therefore, that a legislative or administrative invasion of liberty is impermissible. However, in an equal protection case, *Kahn* v. *Shevin,* 416 U. S. 351 (1974), Justice Brennan, dissenting, insisted that redressing economic discrimination toward women was a *compelling public interest.* Justice Marshall joined him.

4. The matter of compelling public interests is posponed for separate consideration.

5. Justice Black, dissenting in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), said: "If these formulas based upon 'natural justice' or others which mean the same thing are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body."

6. David A. J. Richards, *The Moral Criticism of Law* (Encino, Ca.: Dickenson Publishing Co., 1977).

7. Cf. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

8. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

8. Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," in *Rights,* ed. David Lyons (Belmont, Ca.: Wadsworth Publishing Co., Inc., 1979), pp. 46–57. See also John Rawls, "Constitutional Liberty and the Concept of Justice," ibid., pp. 26–45. The latter paper, first published in 1963, proposes that his principles of justice can identify "certain fundamental liberties," e.g., "an equal liberty of conscience, thought, political liberty, freedom of movement and equality of opportunity." And David Richards's more recent papers are applications of similar principles to identify basic human interests. But none of these approaches deals directly with the issue of which individual interests cannot be invaded for legitimate public purposes alone and what conditions a public interest has to satisfy in order to be "compelling" so as to override even the fundamental liberty of individuals.

9. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

10. I skip consideration of intermediate stages of seriousness of rights, including the hypothesis that First Amendment rights are "superfundamental," that in invading some rights the legislature must have employed the least restrictive alternative (see Brennan's opinion in *Kahn* v. *Shevin,* note 3), and the hypotheses that all fundamental rights are not equally fundamental, so that what is a compelling public interest with respect to one of them may not be with respect to another. I also do not discuss the "incorporation" problems which question whether being "fundamental" under the Bill of Rights is the same as being fundamental under the Fourteenth Amendment.

law theory, as it is understood to apply to the due process clause of the Fourteenth Amendment:

(1) There are two kinds or degrees of liberty: fundamental and ordinary.[11]
(2) Fundamental liberty may be governmentally invaded only where the invasion is justified by a *compelling public interest* (CPI).[12]
(3) Ordinary liberty may be governmentally invaded provided the legislative or administrative scheme which causes the invasion is rationally related to a legitimate governmental interest.[13]

The principle restraining invasion of fundamental liberty is called the "Compelling Public Interest Principle," and that restricting invasions of ordinary liberty is the "Reasonableness Principle" (RP), which I also refer to as the "Magna Carta" principle because of its relation to a certain basic human liberty to which I give the same name.[14]

These three principles also hold in the "Mirror Model" of due process analysis that I construct and do not, therefore, distinguish one model from the other, but rather provide the common core by which both are models of the same legal phenomenon. And, as will emerge later, both models share further legal refinement such as the distinction of two kinds of *enumerated fundamental liberty*.[15]

Now, what is distinctive about the traditional model is this: that *all liberty is considered ordinary (subject only to RP) unless it has been specially protected within our constitutional system*.[16]

Thus, the burden upon one claiming that a fundamental liberty has been invaded is not merely to show that his self-determination has been injured, but also to show that the liberty in question has been constitutionally protected from all but the invasions necessary to the pursuit of *compelling*, rather than merely legitimate, governmental interests. In the Mirror Model, the burden will be described in the same way, but the reasoning process by which the fundamental status of the invaded liberty is established will be different.

The traditional due process model also includes the doctrine that all fundamental liberties fall into two classes: those *enumerated* within the Constitution

11. Cf. note 2. "Ordinary" is not a technical classification beyond this paper.
12. "Compelling Public Interest" is a term of art but without a well analyzed history, so far. The CPI principle stated: *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618, 643 (1969); *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963).
13. The Reasonableness Principle traces back to early constitutional interpretation. See note 14.
14. The corresponding basic human liberty is the moral interest in not having one's life, well-being, liberty, or goods encroached upon through the arbitrary, whimsical, or irrational acts of persons or groups holding coercive power over us. The relationship to *Magna Carta* is indicated by Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244 (1819): "The words of Magna Carta '. . . were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' " See also Justice Harlan in *Mugler* v. *Kansas*, 123 U. S. 603 (1887).
15. Not all of the enumerated liberties of the Bill of Rights are considered so fundamental to the concept of "ordered liberty" that they are "essential." Cf. *Bloom* v. *Illinois*, 391 U. S. 194 (1968). See also note 16.
16. Not all liberty is treated as "fundamental" and as subject to constitutional protection beyond "first level" due process scrutiny. The traditional analysis, in effect, operates upon the principle stated.

and its amendments, and those *unenumerated* liberties which, by various sorts of implication ("penumbras," "emanations," "the concept of ordered liberty," etc.), are derived from the enumerated liberties through judicial interpretation of the Constitution.[17]

The Mirror Model also employs the distinction between enumerated and unenumerated liberties but rejects the principle that unenumerated liberties derive constitutional protection *only* by some "implication" relationship to the enumerated liberties.[18]

The traditional analysis is thus easily represented positivistically. The Court does not "recognize" preexistent natural liberties; rather, it begins from the enumerated and specially protected individual interests called fundamental liberties, and where necessary to "give them life and substance," "to protect them," and so forth, it construes additional liberties to merit equivalent protection—not as ends in themselves, but as means to the vitality and fullness of the enumerated liberties.[19] Thus, academic freedom, the right to study foreign languages, and the like, are found to lie within the *penumbra* of the enumerated right of freedom of speech.

Phrased less restrictively, a positivist account might answer the question "What are the fundamental liberties of persons under the due process clause of the Fourteenth Amendment?" as follows: "They are that subset of the liberties the Court has found to be enumerated within the Constitution which it also has found to be essential to a free citizen in a free society and those additional unenumerated liberties it has found need to be protected equally securely in order

17. Penumbra theory seems to have begun with *Ruppert* v. *Caffey*, 251 U. S. 264 (1920), where the derivation of federal powers was in question and it was held that one implied power may be engrafted upon another; e.g., from the enumerated power of Congress to establish post offices and post roads, there is implied the power to acquire land for post offices and as an incident of that power, the implied power to take by eminent domain. Justice Douglas employed the "penumbra" model for analysis in *Griswold* v. *Connecticut*, see note 5. See also, Paul G. Kauper, "Penumbras, Peripheries, Emmanations . . . ," *Michigan Law Review* 64 (1965): 235; Robert G. Dixon, Jr., "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?", ibid. p. 197; Robert B. McKay, "The Right of Privacy: Emanations and Intimations," ibid. p. 259. Further judicial development of penumbra theory: *Stull* v. *School Bd.*, 459 F. 2d 339 (1972) and cases referred to.
18. Justice Goldberg, concurring in *Griswold* v. *Connecticut*, see note 5, stated, concerning the right of marital privacy, "moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution, would violate the Ninth Amendment, which specifically states that 'the enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.' " I take it that Justice Goldberg maintains, too, that to insist that any nonenumerated liberty that is constitutionally protected must bear some "implication" relationship to mentioned liberties is to impose restrictions upon nonmentioned liberties which are constitutionally protected, limitations created by the list of liberties which have been mentioned, and that is exactly what the Ninth Amendment was intended to prohibit. I share that view.
19. Justice Douglas, in *Griswold* (see note 5) stated: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . The right of association contained in the penumbra of the First Amendment is one, as we have seen." Surely not everything that *helps* give the enumerated rights "life and substance" falls into a zone forbidden to governmental invasion, absent a compelling public interest; yet the Douglas theory does not provide a sufficient condition for inclusion, only what he appears to take as a necessary condition, in clear derogation of the Ninth Amendment.

to give life and substance to the enumerated and essential liberties[20] and to the overall scheme of liberty characterized by the enumerated liberties."[21]

How the positivist description accounts for the distinction, among enumerated liberties in the Bill of Rights, of those which are *essential*[22] to a free citizen in a free society and those that are not, and are, therefore, not fundamental liberties against state invasion, is not as clear. It does appear that at this point some rational philosophical ideal of a free citizen in a free society has to be consulted (perhaps an ideal sketched by the Founders) and its essence delineated.[23]

To the further question, "What *should* the fundamental liberties, other than those enumerated liberties which the Court has found basic, include?" the positivist answer is even less convincing: "They should include at least those that the Court, by acceptable legal reasoning, derives from those already recognized and, perhaps, should include those which the Court ought to have recognized by deriving them, through acceptable legal reasoning, from those it has recognized." Moreover, fundamental status for a non-enumerated liberty is, from the very nature of the tests mentioned, *derivative* from constitutionally explicit liberties (though not every explicit liberty applies against the states).

The positivist's position could lead either to extreme liberal or extreme conservative positions, depending upon what, in fact, prevails as the standard for "acceptable legal inference" at a given time and which of the enumerated liberties have been found so essential to freedom as to apply against the states as well as against the federal government. But as long as status as "fundamental" may be accorded to unenumerated liberty only by way of its "relationship" to enumerated liberty, elasticity in the degree of "proximity" that various justices will require is unavoidable.

The difference between my account and the positivist description is, thus, highlighted. For I maintain that there are many fundamental liberties which are unenumerated, which deserve constitutional protection when cases arise that are appropriate for such recognition, and that cannot in any theoretically developed way be accounted for as "implied" by the enumerated liberties.

20. The protectionist orientation of the Douglas theory suggests that zones of privacy, like a fence about the law, are erected as necessary to vitalize the explicit guarantees of the Constitution.
21. The talk of a "society ordered in liberty" suggests that sometimes recognition of a range of constitutionally protected freedom is in response not to a simple relationship of one liberty to another but to a scheme of liberties, and that is a way of reading the penumbra theory, where several interests intertwine to protect an unenumerated one. Justice Harlan, dissenting in *Poe* v. *Ulman*, 367 U. S. 497 (1961), had said: "the integrity of family life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right. . . . "
22. In *Palko* v. *Connecticut*, 302 U. S. 319 (1937), the subset within the Bill of Rights that is to be incorporated under the Fourteenth Amendment as fundamental rights enforceable against the states is identified as "the principles implicit in the concept of ordered liberty"; to abolish certain constitutional guarantees from applying against the states "is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"—"They are not of the very essence of a scheme of ordered liberty." The expression "essential" also appears in *Bloom* v. *Illinois*, 391 U. S. 194 (1968).
23. The history of the incorporation debate is quickly and incisively traced in Edward S. Corwin *The Constitution and What It Means Today*, 13th ed. (Princeton: Princeton University Press, 1975),

One thing is certain. The Court majorities, with possibly the exception of Justice Douglas, in *Griswold*,[24] *Eisenstadt*,[25] *Loving*,[26] *Roe* v. *Wade*,[27] did not think they were *merely* determining that it is necessary, instrumentally to the protection of enumerated liberties, to protect the unenumerated liberties in question. They thought they were *recognizing* preexistent liberties which recommended themselves for special protection entirely independently of their *instrumental* value for the protection or enlivenment of enumerated liberties and because of their basic political and *moral* importance.[28] And it is for leanings in the *moral* direction, as well as for their judicial activism, that Justice Black so severely castigated them.[29]

A positivist description does not accord well with the tone and nature of the Court's reasonings or with the Court's refusal to confer fundamental status under the Fourteenth Amendment upon all of the liberties enumerated in the first eight amendments. But, as Justice Black complained, neither does loose "natural law" reasoning accord well with the policy of judicial restraint.[30] We have then a constitutional practice in need of a theory.

The Mirror Image The Mirror Image of traditional due process analysis, while agreeing that fundamental liberties are of two classes (the enumerated and the unenumerated) and that the enumerated liberties of the Bill of Rights also fall into two classes (roughly, the essential and the incidental, which will be more precisely classified as the uncompromisable and the compromisable, below), does not accept the view that all liberty is ordinary unless specially protected through enumeration or judicially discerned implication from enumerated liberties.[31] The Mirror Model maintains exactly the opposite: *all liberty is fundamental unless compromised.* Uncompromised liberty is fundamental: it is governmentally invadable only where the governmental interest is compelling. And there are uncompromisable moral liberties, including one's basic natural liberties, which need not be enumerated or implied by liberties that are enumerated. Moreover, there are certain liberties that are more than uncompromisable—that are unimpeachable[32]—and still others that are legally fundamental because they have not in fact been compromised.

The Mirror Model holds that fundamental moral liberty becomes ordinary

24. *Griswold* v. *Connecticut*, see note 5.
25. *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972).
26. *Loving* v. *Virginia*, 388 U. S. 1 (1967).
27. *Roe* v. *Wade*, 410 U. S. 113 (1973).
28. Cf. Justice Blackmun's listing of the privacy cases in *Roe* v. *Wade*.
29. Cf. Black's dissent in *Griswold*, see note 5.
30. Justice Black first presented his attack on judicial activism in 1947, *Adamson* v. *California*, 332 U. S. 46, 74–75 (1947). The battle was still raging in 1970 in *Williams* v. *Florida*, 399 U. S. 78, where Justice Stewart described Black's reactions as Pavlovian.
31. This, I suggest, is the position even the most enlightened cases cited above display, with the exception of the Goldberg opinion in *Griswold*, see note 5.
32. By unimpeachable, I mean, "cannot submit to any invasion by the state (or anyone else) no matter how slight or how well motivated." Thus, Magna Carta Right (the Reasonableness Principle), the Compelling Public Interest Principle, and First Level Equal Protection represent basic natural human rights which are not only uncompromisable, but are also unimpeachable; they are the constitutive threshold for the justice of governmental actions, in the absence of

political-legal liberty through a process of *compromise,* which is strictly limited in structure, and that the liberty retained by the citizens which is protected by the Ninth Amendment is not ordinary liberty but fundamental liberty,[33] which, as Justice Goldberg pointed out,[34] need not be related by implication to the enumerated liberties. In fact holding a "proximity" requirement runs against the Ninth Amendment's own words.[35]

Relationship of the Mirror Model to Traditional Due Process Analysis Now one might argue that from a jurisprudential point of view, I will make no progress. The traditional analysis looks for liberty which has been specially protected, either explicitly or by implication, and has difficulty with not treating all enumerated liberties in the same way and in finding a suitably *rigid,* but legally and politically sensitive, principle of inference for identifying unenumerated fundamental liberties. Its problem is that with every decision it employs a principle which, logically extended, either would admit too much to constitutional protection or would exclude too much.

But my model substitutes for that difficulty the corresponding difficulty of determining *which liberties have been compromised,*[36] and of limiting the effect of the "necessary and proper" clause[37] from having compromised all compromisable liberties not enumerated or strictly implied by enumerated liberties.[38] That is, the Mirror Image is supposedly beset with practical and theoretical difficulties that exactly parallel those of the traditional model. So what is the advantage of supposing that "ordinary" liberty results, constitutionally, from the compromise of fundamental moral liberty, rather than maintaining the customary view that fundamental liberty results from the constitutional protection of certain ordinary liberties?

First, moral principles appropriate as a theoretical basis for our constitutional scheme of liberty, and belonging to a general account of natural morality and of the relationships of individual to government, can be conveniently and perspicuously expressed in terms of the Mirror Image. Second, the problem of

33. Justice Goldberg was explicit on this in *Griswold:* see note 5. "Rather the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."
34. The liberty protected by the Ninth Amendment cannot be merely ordinary liberty since that is already protected by the due process clauses. Rather, the only sense that can be assigned to this amendment must, as Justice Goldberg noted, be that listing rights which require special governmental protection does not restrict others from requiring the same levels of protection and does not constrain the other rights to inclusion within the listed rights or implication relationships to the listed rights.
35. See note 17.
36. With the possibility of recapture of fundamental status and of evolution of interests from compromisable into uncompromisable status.
37. Article I, Section 8, Paragraph 18, of the body of the Constitution, concerning the legislative powers of Congress: "to make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States . . . . " That might be taken to render all liberty not explicitly excepted, as compromised: invadable via legislative actions rationally related to legitimate governmental ends. But this presents a not serious issue which belongs in another phase of the discussion.
38. On this model, the Bill of Rights appears as a list of exceptions to the compromise of antecedent moral liberty to the government, and the Ninth Amendment states that the exceptions are not all of the liberties which are uncompromised.

determining which liberties have been compromised is not as difficult, as later remarks will indicate, as the corresponding problem in the traditional model. Third, the "necessary and proper" clause does not create a wholesale compromise of liberty (a) because of the limitations in the powers granted to the federal government; (b) because there are uncompromisable liberties of various kinds which could not fall under it; and (c) because various classes of uncompromised liberties have been insulated by explicit enumeration and by logical implication from enumerated liberties, just as the traditional analysis supposes.

Nevertheless, for most purposes, resolution of individual cases can be carried out under traditional due process analysis, although the Mirror Image is a warning that the "implication" relationships ("penumbras," "emanations," etc.) are artificial and potentially deceptive, both encouraging the inclusion of liberties by mere analogy to those already recognized and by justifying the exclusion of liberties for lack of the requisite "proximity," which, on moral grounds, demand constitutional protection.

The Mirror Model indicates the central place, theoretically, that moral considerations must play in the identification of certain protected liberties and also the places certain *ideals* of liberty must play in the identification of others (see "Penumbral Inevitability" below). For instance, because basic natural liberty (to be characterized below) cannot be compromised, the identification of a liberty as basic and natural will automatically assure that it is constitutionally fundamental, and protected at the very least through the Ninth Amendment. And who would want to admit that there are *basic* natural liberties, in the sense to be defined, for which our Constitution does not provide appropriate protection—especially when an obvious moral limitation upon the justice of any governmental scheme is this: that in order to be just, a government must suitably protect the basic natural liberties of all persons under its power.

When the question concerns whether the state may impose psychosurgery upon incapacitated and institutionalized persons, the fact that their bodily integrity is a basic natural liberty and uncompromisable will automatically trigger the inquiry as to whether there is a compelling public interest in their invasion. And when we are considering the substantive compatibility of capital punishment statutes with the due process clause of the Fourteenth Amendment, the fact that one's life is a basic natural liberty will automatically trigger inquiry as to whether there is a compelling public interest which justifies the scheme of capital punishment. [I leave aside inquiry into the compelling public interest's existence and how that is ascertained.]

With respect to a liberty which is not found to be basic and natural, it may still be asked whether that liberty was compromised in the formation of the government or by the limitations of power granted to the government, or because of changing conditions of social and political coercion, it has *recaptured* its fundamental moral status.[39] But that involves assumptions about the nature of

39. The principles concerning the *recapture* of antecedent moral liberty are not treated in this paper. But one can see that changing patterns of economic coercion in a society might result in the recapture of uncompromised status for a liberty which, under the changing conditions, has become effectually abrogated. So also, there can be a progressive compromise of antecedent moral liberty with alternations in social-historical-economic conditions.

moral liberty, and instigates questions about whether one can have a moral right to do what is morally wrong, and the like.

That takes us to some of the suggested moral principles that I employ to bridge natural morality to the constitutional protection, via substantive due process of law, of fundamental liberty. For there are moral principles that partially regulate the relationship of moral liberty to political-legal liberty.[40]

NATURAL MORAL PRINCIPLES FOR SUBSTANTIVE DUE PROCESS OF LAW

All Moral Liberty is Fundamental One person is justified in invading the moral liberty of another only where he has an *overriding* moral interest.[41]

By "invasion" with respect to one's liberty, I mean any application of force or the threat of force, whether physical or psychological, which amounts to coercion; that is, which brings about a diminution in one's life, liberty, or property whether the targeted person(s) be willing to have that result or not.[42] There is a further restriction: that the application of force must be targeted upon the persons or the class of persons upon whom the effect is achieved, for the relevant kind of coercion to obtain.

One's moral liberty extends to everything which it is reasonable, given one's knowledge and circumstances, for one by acting, to seek to do, to be, to have, or to become.[43] Thus one has moral liberty with respect to some things which are wrong but which, given one's knowledge and circumstances, are within the range of what it is reasonable for one to do:[44] for instance, for an ignorant parent to provide a rich diet of eggs for a child with heart congestion. Moreover, one has moral liberties in the doing of what is wrong, and some of

40. Moral principles place certain *minima* upon the extent of legal-political liberty under a just government, and certain limitations upon the legal-political restraint of antecedent moral liberty and certain requirements that legal-political liberty shall exceed in scope the range of antecedent moral liberty while, in other respects, antecedent moral liberty must be contracted.
41. I do not explore the concept of "overriding moral interests" in this paper. But it is clear enough that one's interest in the basic necessities of life may override another's interests in mere luxuries and convenience. And *Principles of Remedial Justice* may provide compelling interests by which fundamental liberties may be invaded to *restore* justice in a society.
42. Certain qualifications are needed to achieve a suitably narrow concept of coercion, for which the notion of a *"targeted person"* is employed to imply that the application of force is intentional and that the individual subjected to it is not merely accidentally so subjected. Whether all coercion of another's moral liberty is morally wrong, absent an overriding moral interest, is, of course, disputable; but disputable though it is, it is an entirely defensible hypothesis. To settle the matter, the concept of coercion will have to be refined: when a hunter demands more from a farmer for his pelts, is that coercion? When the telephone company raises its rates, with Public Utilities Commission approval, is that coercion? Where a department store raises prices or discontinues a line of goods, is that coercion? For now, we can regard all of them as coercion, provided there is a *targeted population* who undergo the coercion, even though they are not thought of individually.
43. In the rest of the paper I speak only of liberty in general or liberty to do; the rest is to be supposed.
44. While doing what is wrong is, objectively, unreasonable, it can happen that doing what is wrong is, from a subjective point of view, when the wrong is not realized to be wrong, the only reasonable thing to do.

these moral liberties place restraints upon what a government may do in the way of interfering with a moral wrongdoer.

Invasions of the liberty of another person may arise either from actions beyond the range of one's moral liberty, namely from one's own wrongdoing, or from actions within the range of one's moral liberty. For something may be reasonable, given my knowledge and circumstances, which constitutes coercion against something that, given your knowledge and circumstances, would be reasonable for you to do. Thus not all conflicts of the moral liberties of persons arising out of coercion require that one party be morally in the wrong. (For instance, consider the invasion of moral liberty that results when one non-swimmer struggles for a log against another non-swimmer.)

When we ask whether significant invasion of the moral liberty of another is ever *justified* morally on the sole ground that I am pursuing some good which I am morally entitled to pursue and am doing so in a way rationally related to achieving that good, the obvious answer is "No." For when the "way" I am employing amounts to coercion against another competent adult, the invasion can be justified only on the condition that my moral interest *overrides* his.[45] For instance, your moral interest overrides another person's when that person has already invaded your liberty without justification, and reasonable coercion against him will repell or redress the invasion.

There are, of course, many different particular situations which justify the invasion of one's moral liberty by another. But the general principle seems clear enough: *the range of one's moral liberty may not be invaded, that is, reduced by coercion, in the absence of overriding moral liberty.* We may disagree upon how to specify the conditions in which one moral interest overrides another. But it is still obvious that moral liberty is not analogous to ordinary political liberty: it may not be invaded simply because the invader is pursuing a legitimate end in a way rationally fitted to its achievement. One may not coercively dispose of anything that is within the range of another's moral interest by actions which are arbitrary, whimsical, or otherwise irrational and unreasonable. And one may not significantly invade another's range of moral liberty to pursue one's own interests, in the absence of overriding moral considerations. Thus, moral liberty is not analogous to "ordinary" political-constitutional liberty. Rather it is analogous to fundamental liberty: it requires the moral equivalent of compelling public interest to justify its invasion. That is why I call moral liberty "fundamental."[46] How then is moral liberty related to the formation of government?

45. Were it otherwise, then another person pursuing his comfort in a way rationally related to achieving it, e.g., by taking a short-cut through my field of corn to get home earlier, could invade my interest (e.g., trespass on my land and trample my crops) just because his objective is permissible and the means is a rationally related way of achieving it. We do not, I think, accept such principles.
46. To the objection that this description of moral liberty presupposes the prior distinction of constitutionally fundamental and constitutionally ordinary liberty which it is designed to explain, I reply that the Mirror Image account is *exactly that;* it is intended to presuppose the traditional account of due process but, like a magnifying mirror, to make discernable elements that were not previously distinguishable and coherently related.

Government is the Result of the Compromise of Moral Liberty[47] We can define a "state of nature" as a hypothetical state of mankind in which no competent adult's moral liberty has been compromised; that is, no system exists in which moral liberty may be invaded for less than overriding moral considerations. This may be described as one's state of (logically) *antecedent moral liberty,* a state where the range of one's moral liberty will be both larger and smaller, in various respects, than the condition of *consequent moral liberty,* after a government is formed. By definition, and for independent reasons to be mentioned, there is no legitimate government in such a state: *no coercive power has been entrusted to achieve the common good by means of restraints upon the antecedent moral liberty of individuals.*[48] That does not rule out the possibility that there may be corruptions of government in such a state; there may be individuals who habitually and unjustifiably invade the moral liberty of others, for instance, by making them slaves. The fact that some relatively defective institutions are called "governments" no more constitutes a counterexample to the conditions of "entrustment to attain the common good through coercive restraints upon antecedent liberty" than does the fact that a tree rotting on the ground is not alive constitute a counterexample to a definition of trees as a certain kind of living nonsentient thing.

The formation of a government, whether by contract, consent, acceptance, or other convention, consists in the entrusting of coercive power for achieving the common good to some one or group with that role. The coercion must be directed to the achievement of goods which are in the interest of all[49] and which cannot, as a matter of practical necessity, be achieved by individual action or through mere cooperation.

Some of the things which are in our most basic interest, like bodily safety, freedom from pain, and sufficiency of food, are goods of this sort. Thus, *the authority of government arises from the necessity of its function* to fulfill basic natural interests of all its subjects. The *practical necessity of coercion* which creates restraints upon antecedent moral liberty, to achieve basic natural interests of all, *is the morally compelling individual interest shared alike by all* which justifies the compromise of some of one's antecedent moral liberty.

For a government cannot have coercive power effectively if each application of coercion must be individually justified by the presence of a compelling public need so insistent that failure to realize that need will in some significant

47. Hobbes *Leviathan,* Chapter 14: "To lay down a man's right to anything is to divest himself of the liberty of hindering another of the benefit of his own right to the same." The Hobbsian version of the contract is, in general, like the one espoused here: that out of the necessity of man's condition, he enters into a mutual restriction of liberty, a social contract, for the enhancement of his basic interests. He also defines the civil state in terms of its coercive power.
48. The state of being entrusted with coercive power to achieve the common good has been variously described as one of habitual obedience, acceptance, and other legitimacy conditions. Any otherwise satisfactory account of the legitimacy of the coercive power will be sufficient for the present theory.
49. I leave out the problems concerning who is a foreigner and how a citizen or subject may be characterized.

measure be a failure to govern at all.[50] So, the very existence of government necessitates a compromise of liberty which, among competent adults, is morally fundamental: the compromise permits instances of invasion where *in that particular instance* that public interest does not have to constitute an overriding moral consideration or a compelling public interest, though there is a "compelling" interest of all in the existence of the *scheme* of individual invasions.

Nevertheless, there are certain restrictions upon the compromise of moral liberty to create a political-legal system.

(1) *No one has the capacity to compromise his moral liberty for any interest but his own.* The act which attempts to compromise a moral liberty for the sake of an interest one does not share is morally wrong and is beyond one's powers to permit. For the only justification of government is its necessity to achieve one's *own* interests, since by the very idea of a government, there is coercive restraint upon antecedent moral liberty.

You can[51] compromise a moral liberty just because more basic interests cannot be protected or fulfilled with any certainty in the absence of government (of persons entrusted with coercive power to achieve those interests of all). Thus concessions of nonbasic liberty to the attainment of interests which are shared by all, and without which the interests of all cannot reasonably be obtained, may be justified. For there is a more important interest of *all* which is served by the compromise: the fulfilling of *basic* needs.

Nevertheless, there are some moral liberties which cannot be compromised, that cannot be made subject to invasion for ends less than are *individually*[52] compelling; these are the uncompromisable liberties. And within that class there is a further class of liberties which cannot be made subject to any legitimate invasion by anyone or any group for any purpose whatever; and these are one's unimpeachable liberties.[53]

(2) *The creating of a political-legal system does not compromise the moral liberty of any person against any other person or group, other than the government.* That follows from the concept of a government's arising from the compromise of certain moral liberty for the coercive achievement of basic moral interests which are shared by all. Nevertheless, incompetent individuals, children, the insane, the very ill, and the aged have, from the very necessity of their condition, certain nonbasic

50. This is only a first approximation of the conditions which constitute a function of the government to be under particular circumstances a compelling interest, justifying the invasion even of the uncompromisable moral liberties and excepting only the unimpeachable liberties from invasion.
51. I mean "have the moral capacity."
52. Compelling interests are only *case by case* compelling. There are no interests of government which are compelling as such, and apart from the particular circumstances. Thus although a child may be taken away from his parents because the protection of the child is a compelling interest of government, that interest does not *become* compelling in circumstances which do not involve a significant threat to the welfare of the child.
53. The unimpeachable liberties correspond to the two due process principles and "first level" equal protection of law: that persons will not be legislatively or administratively disadvantaged via classifications which bear no rational relationship to the end or function of the legislation or administrative scheme. Those principles can, in the abstract, be shown to be applications of one's Magna Carta Right, one's right not to have one's interests invaded for impermissible ends or in ways which are arbitrary, irrational and unreasonable.

human rights compromised to those who are responsible for their well being. But in no case is their Magna Carta[54] right diminished: they are always to be treated in a rational way; and from that it follows that their very important human interests may not be invaded for reasons less than overriding.

(3) *Minimum government is no government at all.* If all of one's moral liberties were given political-legal status as fundamental, that is, as invadable by the government only in the presence of a compelling public interest, there would be no government at all. For there would be no vesting of a greater coercive power in any group of persons than there is already vested naturally in each individual and cooperative group prior to the formation of government. In a state of nature, *any individual may invade the nonbasic (and, sometimes, the basic) natural interests of another where the necessities of his own basic natural liberties require.*[55] Hence, unless some greater invasive scope than that is entrusted to government, or some compromise in the range of one's individual prior antecedent liberty to employ coercive acts in the presence of overriding moral interests is granted to the government, there has been no change at all. In the absence of such a compromise, if there is a compelling public interest to justify the invasion of someone's liberty, then there is some individual or group whose interest it is, and *they* have already an overriding moral interest in the invasion. Thus, to speak of a government before whom everyone's individual moral liberty is coextensive with everyone's political-legal liberty is to speak not of minimal government but of no government at all. [Therefore, the very existence of government requires the compromise of antecedent moral liberty. And that is evidenced in the very description of government I offered above: a person or group entrusted with the exercise of coercive power to achieve the common good through coercive restraints upon antecedent moral liberty.]

Not All Moral Liberty May Be Compromised One might misleadingly imagine the formation of government as follows: that independent moral agents entrust a coercive power with the achievement of certain common objectives, granting it whatever instrumental powers to invade individual moral liberty as may be reasonably necessary to the attainment of the common good. That is equivalent to the compromise of all compromisable moral liberty in so far as its invasion may be useful to the attainment of the common good. This would be a government of maximal means for its objectives.[56] That image encourages one toward a totalitarian conception where all liberty is compromisable for the ends of government.

But there is another image of things. Not all moral liberty is compromisable;[57] moral-liberty imposes limits upon the powers of government, and even among compromisable liberties, under some governments, some are insulated from compromise by special constitutional protections and by limitations upon the grant of powers to government in the first place (for example, the U. S. Constitution of limited powers and objectives).[58]

Not all moral liberty can be compromised because not all moral liberty is of the same kind. Liberty is not all of the same kind because the needs and interests which give rise to it differ importantly in kind. (One's moral liberty can be invaded only through invasions of some corresponding interest.)

Some interests of human beings, while serious, are incidental, arising from the accidents of birth and place. But others arise from the *universal human condition:*[59] being a rational animal living on the earth in situations of partially controlled and partially enriched environment, with physical and emotional conditions which are never more than partially under control, and for whom illness is likely and death inevitable.

Some interests generated from the universal human condition are: one's need for and interests in food, shelter, relief from pain, protection against bodily assault; one's need to have human companionship, to feel and deserve respect for oneself in comparison to others in similar circumstances; one's need to possess some material goods, to share human affection at least in infancy and not to be forcefully deprived of affection throughout life. Corresponding to those interests and needs there are interests in *doing, having,* and *becoming,* which, if coercively restrained, result in invasions of the universal human interests mentioned.

Not every universal human need has to be satisfied directly. The need to possess material goods can be satisfied by surrogates in certain kinds of communal life where individual possession is obviated. But certain human interests cannot be sublimated or surrogated and if frustrated (for whatever reason and from whatever cause), result in the serious damage of and even the destruction of the individual: for example, the need to be loved,[60] which if frustrated from infancy, destroys the mind and, of course, the need for the means of life, which if frustrated, by definition eventuates in death.

54. One's Magna Carta Right is one's moral right as described in note 14. I give it this name because of the affinity of the minimal protection sought and achieved by the barons of England against the despotic whims of King John; it also corresponds to the first conditions for reasonableness, which Aquinas made a necessary condition for the justice of law, and it nicely corresponds to a basic moral interest, shared by all persons, in being treated reasonably by those who hold coercive power over us, however they came by that power.
55. Hobbes and Locke both held this view, as did Francis Hutcheson in *A System of Moral Philosophy* (1755).
56. If the government held a comprehensive mandate to achieve the common good as far as is morally possible, it would be a "morally maximal government."
57. For instance, Hobbes thought that no matter what your object, you could not alienate your liberty to defend your own life. And that is similar to the argument presented here, because there is nothing in the way of your own interest that you could receive in exchange or for which this interest could reasonably be subordinated.
58. The granted powers of the federal government are not as extensive as they could have been. For instance, the power to regulate commerce is restricted to interstate commerce; and the health regulation powers do not extend to a mandate for a national code of public health and the like. Thus, there are liberties of citizens that are uncompromised simply because Congress has no appropriate power for invading those liberties: e.g., your liberty to practice any lawful trade—Congress cannot institute a national licensing scheme for bartenders, for instance.
59. Hobbes is, for instance, emphatic that the conditions from which the need for government arises and which constitute the necessity of its being are not incidental facts but are inherent in the relationship of man to his natural environment.
60. For instance, the loss of one's capacity for self-esteem and the ability to form one's own conscience can result from love-deprivation and constitute significant damage to the individual. The need for and love of one's natural parents is, of course, surrogatable. But the need for and love of a parent, to be loved parentally, is not.

Basic natural interests are all those human interests which cannot be surrogated and which if significantly invaded (or by accident of environment frustrated) *eventuate in the death or significant damage of the individual,*[61] *not by happenstance but as a result of the universal order of nature.* One has *basic natural liberty* with respect to all those things which are, in the course of nature, necessary for the fulfillment of one's basic natural interests, as defined above.

These basic natural liberties are among one's "natural rights" because they arise from the *status hominis,* the condition of being human, and cannot cease to be in the interest of each individual as long as it is human and in the human condition.[62] These liberties cannot be compromised because the *status hominis* cannot be changed in such a way as to make a compromise of such liberties in one's interest or to obviate such interests, for example, by making food unnecessary. Moreover, these liberties are "natural" in opposition to "conventional," "conferred," "acquired," "societally derivative," and the like. Of course, not all natural rights are basic or uncompromisable; but the basic human liberties are uncompromisable.

There is a reason why such liberties are uncompromisable. The agents forming a government simply have not the power to compromise moral liberty for something that is not in their interest: it would make them foreigners and would make that which is to be a government in relation to someone, not in fact *his* government, but only a government within whose power he finds himself, like a traveler, because its coercive power is not designed to achieve his interests. Since the basic natural liberties involve interests from which a person cannot divest himself while still remaining in the human condition and since it is the uncertainty of the fulfillment of those interests which is the cause of the necessity of government in the first place, one cannot compromise to a government those interests for which the achievement of said government is alone justified in the first place.

I have not attempted to list exhaustively the basic natural liberties of man.[63] That is a matter for a separate inquiry. But I have indicated the conditions by which such liberties may be identified and the reasons why they cannot be compromised and, therefore, form limits upon the power of government. That should also sufficiently distinguish the compromisable and the uncompromisable human liberties and permit application of the distinction to the constitutional problem.

Constitutionally, Fundamental Liberty Includes Uncompromisable Moral Liberty and Compromisable but Uncompromised (or Recaptured) Moral Liberty *Not all compromisable liberty has been compromised under our government.* Although some of the liberties of individuals which are enumerated in the

61. Insanity, inability to adjust to society, and the like are all serious damages.
62. The Hobbesian equivalent is the right of self-defense, arising from one's interest in preserving one's own life from the depredations of all others.
63. Nor have I developed the ancillary hypothesis that one's natural interests and rights, though not one's basic and nonsurrogatable interests, can evolve and can change as a consequence of changes in the human condition. For instance, self-awareness and awareness of the conditions of one's happiness is an evolving state for mankind; as the consciousness is "raised," needs such as the need for seeking truth, the need of freedom of thought and conscience, emerge into consciousness and make a moral demand that was not as urgent before.

Constitution and its amendments are basic natural liberties, not all of them are: for example, the right to jury trial in civil suits.[64] Many moral liberties which could have been compromised in the formation of government were specifically excepted, through the Bill of Rights and also by the limited grant of powers to the federal government. An example of a serious but compromisable moral liberty is provided by the equal protection clause of the Fourteenth Amendment which, judicially interpreted, excludes the disadvantaging classification of persons by race, religion, or nationality without a compelling public need. A government could be set up in which that moral interest is not protected and still not be inherently unjust. All those liberties in the Bill of Rights which the Supreme Court has refused to find to be as stringently protected against state invasion (via the Fourteenth Amendment) as against federal invasion must be regarded as compromisable moral liberties:[65] otherwise the difference in treatment would not be justifiable. (One should recall that uncompromisability does not entail absolute uninvadability but only that no invasion is justified absent a compelling public interest.)

Liberties subject to compromise or liberties about which there might be serious dispute as to whether they are subject to compromise (and are, therefore, invadable by the merely rational acts of government, for example, freedom of the press, freedom of religion, etc.) were specially protected because of the great political and moral importance they were assigned by the Founders. That such liberties, in the interest of an ideal free citizen in a free society, have *not* been compromised in our federal system does not logically imply that they cannot be compromised in some just government. The explicit distinction among essential and nonessential elements of liberty in the Bill of Rights during the "incorporation" dispute shows that the Supreme Court has already recognized that principle.[66]

Uncompromised moral liberty includes both uncompromised and uncompromisable antecedent moral liberty and certain *consequent* political liberties, for instance, the basic rights, privileges, and opportunities *created* through the founding of government: voting rights, opportunities to hold public office, rights of travel and association, privileges of citizenship, and so forth.

Since not all antecedent moral liberty which can be compromised *must* be compromised in the formation of a just government, we can compare just governments according to the extent to which compromisable liberty has in fact been compromised. But that suggests that we can identify, under our government, which compromisable liberties have been left uncompromised.

64. Although the Supreme Court recognized that some elements of the Bill of Rights are incorporated against the states under the Fourteenth Amendment, certain enumerated rights, for instance, the right to jury trials in civil suits, were regarded as basic rights against the federal government but not of the essence of liberty and therefore applicable against the states.
65. That is evident from the fact that it is beyond the power of a just government to reduce an uncompromisable liberty to status of "ordinary," subject to the Reasonableness Principle alone.
66. For instance, the court distinguished among enumerated liberties the "principles of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934); "principles of justice which lie at the base of all our civil and political institutions," *Herbert* v. *Louisiana*, 272 U. S. 312, 316 (1926). See also the passages cited above in note 21.

Penumbral Inevitability How does one identify the compromisable but uncompromised (and, therefore, fundamental) liberties which are not constitutionally enumerated? Certain fundamental liberties, such as marital privacy, could have been compromised. Yet a long and unbroken history of governmental respect indicates that family life is governmentally invaded only in the presence of a compelling interest (for example, the welfare of children),[67] and, historically, there is no reason to believe that so basic an interest has ever been subject to governmental invasion for less serious considerations.

Although Justice Douglas used his penumbra theory in *Griswold* to identify marital privacy as a specially protected liberty, there was enough independent historical evidence, cited also by Justice Goldberg, to indicate that a family's privacy from governmental intrusion had always been considered of paramount importance. That was sufficient to establish that the liberty was fundamental and had not been compromised. It was not necessary to apply the "penumbral implication" process to derive the liberty from enumerated rights. Nevertheless, cases do actually arise in which such reasoning is necessary.

The pattern of enumerated liberties, filled out with the other liberties whose history shows clearly to have been insulated from governmental invasion, yields a sketch of a society "ordered in liberty" and provides the connecting premise for defensible penumbral reasoning.

Where the key question is whether a certain liberty is constitutionally specially protected, we ask (a) is it an uncompromisable basic natural liberty; (b) is it a compromisable but uncompromised liberty? In order to settle the latter, we further ask: (c) is it explicitly enumerated or strictly implied; (d) does it belong to prior judicial construals of protected liberty; (e) does it have a history of special and discernible governmental recognition requiring compelling interests for its invasion, as the privacy of the family, the natural precedence of parental custody, parental interest in the education of children, and the like; and (f) when we examine the enumerated and previously construed fundamental liberties with our attention directed to the scheme of a "society ordered in liberty" that they trace out, does the protection of the alleged liberty appear to be necessary, under prevailing conditions, for the actual and appropriate realization of that ideal? *That* is penumbral reasoning and it is inevitable.

For we cannot deny the Supreme Court a value-making role in society. Justice Stewart warned that Justice Black's strict constructionism would stultify liberty in the long run.[68] The Court, to protect liberty, must employ value-suffused construals of the facts of its cases and of the conditions of society. Otherwise, it could never determine whether conditions had so changed as to create a *recapture* of fundamentality or discern that property rights no longer function as the basis and guarantee of one's liberty but, rather, that one's interest in governmental assurance of the necessities of life and health may have become fundamental, as a result of the concentration of economic coercion in

67. A glance at typical family law cases, where the state must intervene in the interest of the child, either to protect it from abuse or to secure adequate medical care or the like, reveals that the interest of the state is described as compelling.
68. *Williams* v. *Florida*, 399 U. S. 79 (1970).

corporations and agencies at great remove from individuals. The Court must be able to discern such changes, measuring them against the background ideal of the free citizen in a free society, and must be entitled to classify liberties accordingly as it finds they are needed to realize that ideal. Therefore, no competent theory of due process interpretation can rule out some form of "penumbral implication" of liberty from enumerated ones; but neither should an adequate theory confuse this kind of reasoning with the other kinds of reasoning distinguished above, which underlie it.

The Mirror Model of due process demarcates the place natural basic moral liberty must be accorded under the Constitution, provides an account of why certain other liberties are regarded as fundamental, indicates the moral principles upon which the discernment of fundamental liberty may be founded, and identifies the role and the inevitability of "penumbral implication" from enumerated and previously construed fundamental liberties to new construals of individual freedom.