

MARSHALL P. MADISON LECTURE

Constitutional Transformation: New Wrongs, New Rights*

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THREE TRANSFORMATIONS have influenced our time. The first is a transformation that we celebrate. It is represented by many different kinds of progress: material progress, scientific progress, medical progress; all the things that would be wonders if we encountered them with fresh eyes. The second transformation is one that we don't like to think about, and that represents all of the unwelcome side effects of the first transformation; essentially, the unpaid bills of the first transformation. Thus, the second transformation includes pollution, the urban problems of our cities, poverty, and joblessness—the many things that have gone wrong as a direct result of what we celebrate as being right. We very often don't connect the two. When we look at the bad transformation we tend to see it as a separate phenomenon and not recognize that it simply represents the flaws of the first transformation.

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The third transformation is something that is now only in the making. It would be a positive adaptation to the second transformation. Included in the third transformation would be ways of dealing with the unpaid bills, ways of solving the problems of industrialization and modernization. It would be a triumph if it succeeded because it would begin to solve what have up to now seemed to be the intractable problems of a society that is dedicated to constant change.

The second transformation has caused many changes in relationships of power and powerlessness. There are all kinds of powerlessness today that we never knew before. Consider the powerlessness of the airline traveler, the powerlessness of the person who is assaulted by pollution, or the broader powerlessness of the underclass. Power has flowed to great organizations such as government and large institutions. Power has flowed away from the individual, whether that individual is situated high or low in the economic ladder. And as that powerlessness has increased so has concentrated power in the hands of others, so that on the decision perhaps of just a few executives, 10,000 people may be laid off from a large airline; 10,000 people lose their livelihood and it doesn't seem as if there is any remedy for them.

As powerlessness increases and excessive power increases in other areas, we begin to experience the birth of what might be called new wrongs; new ways in which people lose their constitutional rights and their constitutional protections. I see these new wrongs as all being members of the same family. All of these new wrongs are extraordinarily difficult to correct, even if the majority of the people want to correct them. And it is extraordinarily difficult to fix responsibility for them.

You may recall, back in 1982, the story of Christopher Peterman, which was the subject of numerous newspaper articles. Christopher Peterman was seventeen years old and unable to pay a small fine for a minor traffic infraction so he was sentenced to spend a weekend in the Boise, Idaho jail. His parents could have paid the fine, but they felt the weekend in jail would teach their son a valuable lesson. He was placed in a cell with five other boys his own age. Over the weekend, the others began taunting Christopher and he soon became a victim for the group's frustration. The taunting turned to beating, kicking, and finally to torture, and on Monday, which happened to be Memorial Day, he was beaten and

kicked continuously for a period of about four and a half hours. The jail was short of guards on the holiday weekend and those on duty saw and heard nothing. Finally, he was found unconscious in the cell's shower room. He was taken to a hospital where he died without regaining consciousness.¹ The sheriff said that budget cuts had reduced his staff and he was quoted as saying "it is hard to determine if there was anything we could have done to prevent this."²

This tragic event is an example of the family of new wrongs. Violence, death, overcrowding, and deprivation of elementary human rights is more and more the norm in our prisons, whether federal or state. Christopher Peterman's death was not so unusual or different from what happens in many prisons.

Yet, responsibility is very difficult to fix. Who was responsible? The boys who did the beating? The guards who saw and heard nothing? The county that failed to provide an adequate staff? Because the problem is nationwide, I would not want to stop with any of those explanations. I would want to look at a more general cause. Such prison conditions are contrary to the basic values of a majority of Americans. We condemn other countries for human rights violations and we do so with great sincerity. We often take note of the way prisoners are treated in countries we condemn. Surely a majority of people do not want to see America, which has 500,000 prisoners,³ be a major human rights violator. But the majority seem powerless to have their principles recognized; somehow the values that we hold are lost.

How are they lost? One way they are lost is due to remoteness and the tremendous distancing between the budgetary decisions that allocate funds in other directions without any thought about prisons. This particular form of human rights violation is the result of an unbalance of forces in our society. The forces that fill up the prisons are much stronger than the forces that pay the bills. The forces that fill up the prisons have behind them all the power that our society can muster: the politicians, media, ideology, and public fear. No similar force is behind responsibility for our prisons.

This wrong is inadvertant and unintended. We think that we

1. *Youth, Jailed as Lesson, Dies; Five Young Inmates Charged*, N.Y. Times, Jun. 3, 1982, § I, at 20, col. 5.

2. *Idaho Sheriff Says Jail Had Monitor*, N.Y. Times, Jun. 9, 1982, § I, at 15, col. 1.

3. *More Room for the Big House*, TIME, Aug. 10, 1987, at 25.

are not violating human rights because we don't mean to. We believe that we are good people, we meant no harm; we never made a choice or a decision to have inhuman prison conditions. This, of course, is both a denial of reality and a rejection of responsibility.

The law is deeply implicated in this injustice. The wrong could not occur without the active participation of law; in a sense it is the law itself that commits the injustice. And inaction plays an essential role. The wrong occurs merely by not doing enough to supply the needs of the prisons, and not doing enough to ensure legal protection of the prisoners.

This unbalance of forces is present in many new wrongs. One form of change is allowed to go forward, but a balancing form is not as strong and lags behind, and the result is severe deprivation to some people. I'm trying to describe this process in terms that are more structural than ideological, because in essence it is a structural problem rather than an ideological problem.

It is remarkable how many ways there are for constitutional protections to be lost by this process of misdirected priorities and inaction. One could never imagine them all, because they are as varied as society itself. Once we begin to recognize them, we can see them everywhere. It may take no more than an advance in technology to end up with a wrong. For example, with the great progress in medical technology we are able to prolong human life indefinitely, yet we don't have the accompanying principles and laws that bring freedom of choice along with the technology. So the result is that the people themselves and their families are losers. They lose in the sense of losing freedom of choice. They gain in the sense of gaining the miracles of the technology. But the law that should accompany those changes lags far behind.

This pattern will be seen over and over again in different areas. Imagine an all male university that also has an all male dining club. The university goes coed, but the dining club does not. A wrong arises that wasn't there before. Simply by inaction, a club that used to be open to everyone on campus is now discriminatory. In criminal procedure, for example, if more and more people are processed at a point before the trial; if more and more people are allowed to plead to a lesser offense; if more people are disposed of one way or another at an earlier stage in the prosecution, then that's really where the trial takes place—in the police station, in the interrogation room. And if the protections of the Constitution

do not apply to that early stage, a new wrong will arise, because the right to counsel guaranteed at the time of trial⁴ may not be guaranteed at the early stage, which is now a substitute trial for most people.

Another kind of wrong occurs when people change the nature of the investments they make, either investments in material things or investments in emotional things. If we formerly placed our security in a house or land, we had constitutional protection for that. If, however, today most of us put our security in something more intangible, let's say a job, we may find that the job doesn't carry with it the same constitutional protection as the house or the land did. And so the person who substitutes an investment of a new kind for an investment of an old kind may lose in terms of constitutional protection. There is less security because the Constitution has not kept up.

The same process applies to emotional investments: if we invest in a traditional family, then the law protects those relationships. If, however, somebody becomes a foster parent, and the relationship continues perhaps over a number of years, the foster children and parents in this relationship may find at any moment that an administrator can uproot this family by moving the children to another home without the same kind of protections as there would be if somebody tried to move natural children out of their family home.⁵ The foster parents sign a contract saying they will give up the children at any time. But when a number of years goes by one can hardly expect that there would be no emotional investment.

Another way that these new wrongs occur is what I call the "raised minimum." If the cost of living is raised to a scale where only a wage earner who is part of a large organization, institution, or corporation, can keep up with the cost of housing or of medical care, then all those people whose sustenance is not keyed to a large organization have been left behind. They have less than they had before, because now there is a higher minimum just to survive and have the necessities of life. And if they are not keyed in to something that rises at the same rate, then they will find that housing or medical care or any other need, becomes out of reach. My

4. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

5. See *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

grandfather was a doctor in the Chelsea district of New York and he used to charge one or two dollars and he was quite willing to walk up four or five flights of a tenement house to visit somebody who was very ill. That kind of medical service may not be as good as what you can get today in a modern hospital. But that kind of medical service is better than nothing. What has happened today is that this sort of doctor has disappeared and at the same time medical costs have risen to the point where a whole sector of society just cannot afford serious medical expenses. Something is taken away when the minimum is raised but everyone is not raised along with it.

As this pattern applies to more and more areas of life, it seems to me that it becomes a breach of the social contract. It denies to people any meaningful "citizenship." "Citizenship" requires that a person have the means to survive. If the minimum means to survive keeps getting raised higher and higher, there will be a second class of citizens who don't go up and therefore go down and lose what they have. And this division between those citizens who might be called "members" of society and those citizens who are not "members" but are merely bare citizens, creates a greater and greater injustice.

In the same way, we neglect public libraries, public schools, the mentally retarded, foster care children, and day care children. All the important values of life that do not have the forces of organization behind them go down, simply because the others are going up and are not taking these other values along with them. The prison example fits into this category of values that society fails to support and therefore allows to fall.

Now of all of these values, one that seems to me very important to focus on is the value of livelihood. The opportunity to make a living, to have a livelihood, is absolutely indispensable to life itself. I believe that the concept of "life" from the "life, liberty and property" guarantee in the due process clause, must embrace the concept of a survivable life, a life that is above the line; the ability to survive and function in society. Unfortunately, we have forgotten that concept in the process of transforming the workplace. When we think about the workplace today, we must think about how much the livelihood of most people is in the hands of a very few and how the decisions of a few can be made in such broad economic terms that very little is done to consider the impact on

individuals. For example, there may be a decision by a central bank in Washington, or by economic planners in a rarefied atmosphere, that may make it very hard for many people to earn a livelihood. Livelihood should be an important issue in the controversy about drug tests in the workplace. We hear a lot about the conflicts between the right of the employer, and presumably the public, to have workers doing a good job or a safe job, versus, we are told, the right to privacy.⁶ It seems to me there's a value that's left out, and that's the right to livelihood. Clearly the right to livelihood is jeopardized by drug testing. There is now a new way to lose your job. However justified one may think drug tests are, why should they be tied to potential loss of livelihood? Why should people be made more insecure, in this most basic aspect of life, for another purpose? One could undertake drug tests—I don't happen to think it's a desirable thing to do, but others might—and not tie them to loss of a job. Why jeopardize livelihood? That value is too important to threaten in this way.

Livelihood should be raised as an issue in economic layoffs. Why shouldn't such layoffs require due process of law? After all, they are not the fault of the person laid off. That person has kept his or her side of the bargain. Before accepting the idea that people can be laid off on a mass basis, we must question whether they are the proper people to bear this entire cost. Are there are no others who should share part of the cost, including the company and its customers? Why should workers be the only ones who bear the entire cost? Would this suggestion be a shocking interference with the free market? But there is no free market for the laid off employees. They have no choice at all; they have no say and they have no power in this situation. We have a one-sided freedom.

Both Judge Kennedy and Judge Bork⁷ had occasion to pass on the question of whether homosexuals could be denied employment in the Armed Forces. The principal issue raised was privacy. But the hidden issue is livelihood. As the Armed Forces have changed from a temporary group of men gathered together for the purpose of defending the country in wartime, to a permanent organization of men and women offering jobs that are like other jobs and, in-

6. Stern, *Government Drug Testing and Individual Privacy Rights: Crying Wolf In The Work Place*, 5 YALE L. & POL'Y REV. 235 (1985).

7. Regarding Judge Bork, see *Dronnenberg v. Zaech*, 741 F.2d 1388 (D.C. Cir. 1984). Regarding Judge Kennedy, see *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

deed permanent careers—as that change takes place, livelihood gets implicated more and more. It becomes important to ask, “How many other areas of livelihood are likely to be influenced by decisions concerning the Armed Forces?” Surely that issue is at least as important as the issue of privacy.

As we look through society we can see how livelihood is at stake in many different areas and needs protection on many levels. If we look at the public schools, we will find that decisions about livelihood are being made as early as grade school where different “tracks” are established. One track for those students who are going to have a secure place in society and another track for those whose place in society will be problematic—those who are doomed to always be on the bottom, always be insecure and never know what it means to feel safe and happy in one’s own life. That kind of a decision, made at such an early grade, is an awesome one. And the student doesn’t really get to participate in it; the parents don’t really get to participate in it. Don’t we need to protect against a decision making process that decides the entire future of so many people in this country? Don’t we need to say that this is the very kind of power that the Constitution was designed to surround with safeguards and constraints? Above all else, the Framers cared about preventing the arbitrary use of power, wherever it might be found. Therefore, when we find livelihood decisions are being made in the schools at an early age by secret processes, then that is where the protection of the Constitution belongs.

Technological and institutional change has greatly affected our existing assumptions about free speech. It is the case of the raised minimum again. It costs a lot of money to speak in a way that is influential and effective. It costs a lot of money to speak in a way that can be heard. To be heard by our fellow citizens we’ve got to get access to the media. We’ve got to be seen on television; you’ve got to be read in the newspaper. Speeches on street corners are just plain ineffectual. It’s free, but it doesn’t reach enough people. Speech that is really going to influence people, speech that is really going to make people think about decisions that have to be made, that kind of speech costs—five thousand dollars a minute? One hundred thousand dollars for ten minutes? I have no idea what it costs. But it costs more than any but the wealthy and powerful can pay.

We need to look at television and wonder: where are the other

points of view? Even a comparatively intelligent program like *MacNeil/Lehrer* doesn't offer very many points of view. A moderate establishment figure will debate a right wing conservative, but the Left is repeatedly given no representation. Less accepted points of view simply don't get heard.

Once again it's important to notice that this wrong is accomplished with the aid of law. Television channels are allocated by law and non-licensees are prevented from broadcasting by law.⁸ Law is active here all the way and as a result, free speech is denied to about ninety percent of the spectrum. When I think about what freedom of speech is supposed to mean, I feel this television monopoly calls for a drastic change. And I think this is one important reason why the country doesn't run as well as it should. Some of the best ideas about how to run the country simply can never get heard and as a result we go right on, with the same bad ideas that didn't work before and that won't work again.

Any fair appraisal of where we stand today in terms of constitutional rights should recognize that we have suffered severe net losses. We are way down on the scale in terms of the original operation of constitutional principles. We haven't been observant about the incremental loss of constitutional liberties. I think that we need a Constitution that vigorously keeps up with every change the country makes. I think we need a Constitution that is as capable of transformation as is the society that it is meant to protect. If we had a static society, perhaps we could have a static Constitution. But if we have a society that is constantly at work creating new worlds then we must have a Constitution that is equally creative in following power and powerlessness wherever they may go. This doesn't mean that the Constitution changes, it means only that the application changes. The principles stay the same, yet the application changes with society's transformations.

We should, for example, constitutionalize the corporate work place. We should constitutionalize the public and the private work place. I would contend that the disparity of power between corporations and employees is so great that this is an area that now has ceased to be free in the free market sense. The power of the individual to ensure his or her own livelihood has been lost. Constitutional protections would simply restore what has been taken away.

8. 47 U.S.C. §§ 307-310 (1981).

And it wouldn't require any ideology except our present constitutional ideology to do that.

We should attempt to constitutionalize a boundary of moral independence for the individual, drawing a line around personal autonomy that must be observed no matter how things change. There should be a zone of individual choice that compares to the zone that originally existed. I would see it in terms of a balance: how much was originally the zone of the individual, how much was the zone of the organized part of society at our starting point 200 years ago? We have to try to keep the proportions the same even though the circumstances change in many ways.

We should establish a right to have a home because that again was something that was within the reach of most people when the Constitution was adopted and it is no longer in the reach of everyone today. Without a home a person cannot effectively be a citizen, or vote. The homeless cannot take part in democracy.

If we want to have a dynamic society we must also be dynamic in terms of constitutionalizing the new developments that take place; we can never rest from this task. If we choose the first kind of transformation and if we suffer the second kind, it seems to me we owe it to our principles to adopt the third kind.

One may ask whether the law is the proper vehicle for making these important changes. *Disabling America: "The Rights of Industry in Our Times"*⁹ by Richard Morgan, says that "new rights" isolate the churches, destabilize the schools, enfeeble law enforcement, undermine the maintenance of order, preempt private outcomes, and corrupt constitutional interpretation. This kind of view of rights sees people who seek rights as overdemanding children, who ought to be quiet and enjoy their position in life instead of squalling and squawking and squealing all the time. This viewpoint says no to these demands: be quiet, you're out of turn.

We need to see the rights that are being asked for as remedies rather than requests for something more, something new, something that people never had and don't deserve to have. The more that we live in a structured, bureaucratic world that is governed by law, the more that law is going to have to meet requirements of fairness. Our tendency over 200 years has been to make everything more and more structured, everything more and more legal. There-

9. R. MORGAN, *DISABLING AMERICA: "THE RIGHTS OF INDUSTRY IN OUR TIMES"* (1984).

fore, law has to finish the job and ensure that protection of individuals is included in the entire process. I see no danger from rights because I think that if we adopted all the rights that we could possibly imagine and then some, I believe we'd still be behind the original balance between the state and the individual. Individuals would still be in a position of trying to catch up.

America is in danger of changing from a constitutional state to a managerial state. Management is the opposite of constitutionality. Management involves hierarchy, not equality; management involves decision making from the top and not democracy; management involves discretion, not the rule of law. The more that we go toward management, the more that most people's lives are subjected to management rather than the constitutional process, the more the Constitution gets pushed to one side. I sometimes call it the "Shrinking Constitution." The Constitution then becomes like a national park, a preserve where values remain, but in the real world outside the national park you have a very different process; a very different kind of decision making.

We have a basic conflict here. If we allow the management principle to triumph, we will have no Constitution. It is said, of course, that management is efficient and that constitutional government is not. Perhaps there are many areas where that is true, but I don't think we have to choose one or the other. I think we can have management but that we can also bring along the Constitution with us to establish principles that will ensure some kind of fairness, some kind of participation, some kind of balance of rights in each of these areas. I don't think that you can have one without the other. I think that as we see that more and more actions are taken in a way that is not constitutional—look, for instance, at the Iran-Contra affair—we'll see how this tendency is powered by tremendous forces and it has to be curbed as energetically as those forces themselves are energetic.

Before we say to ourselves that a development like this is not something that the law should undertake, we should look at the kind of functions that rights can perform in our society. One of the things that rights can do is establish priorities. It's like an individual's personal life: if we persistently neglect one area of our needs, we must then put it up at the top of the list, give it a priority. Thus if we say that prison conditions amount to cruel and unusual punishment, that's a way of giving prisons a priority. That's saying

we've got to take care of this before we go on about the rest of our business. In my view, use of rights to establish priorities is essential where those priorities otherwise would fail, and with them the kind of values that are important to our survival.

It's also important to realize that rights are needed by the majority, because a majority of us are also one or another type of minority. We are all minorities because our interests are separated in so many different ways. When we try to protect our interests, we are a minority. Even something that is universally cherished, such as the wilderness, is a minority when it comes to the struggle for recognition under our legal system. This means that there is no majority for any particular value. This explains what I think is one of the striking phenomena of our time; we have a country that in many ways does not reflect what most people want it to be, and to the extent that's true it's because the majority has been divided up into so many different minorities that they are unable to get together to protect values that, in fact, everybody wants and everybody needs.

I see rights as having many other important functions. Giving us a chance to converse is one function that is vitally important; allowing us to talk about rights and wrongs even if the decision is not always in favor of the right. If we have talked about the wrongs, if we have talked about the injustices, we have some basis for community. If we don't talk, then disempowerment results.

We also need rights in order to have an idea of what we all deserve. Did you read the recent newspaper story of the anchorwoman who found herself out of a job and then homeless, in one dizzying fall?¹⁰ Well, wouldn't it be better if we all knew that we were entitled to a home? Even though some of us may never be in such desperate straits, any of us might be. It seems to me it would make everybody feel a bit better to think that our participation in society has earned us the right to some kind of shelter, no matter what misfortune may occur to us.

I want to suggest one argument for rights that grows out of the malfunctions of our system. We need to see rights as constraints upon the system; we need to see rights as a way in which the system is regulated. We have plentiful regulations for people and eco-

10. *ExAnchorwoman's Slide to Homelessness*, San Francisco Chron., Oct. 26, 1987, § B, at 3, col. 2.

conomic activity, but the system itself goes on virtually unregulated in the large sense. There are many small regulations, but in a large sense, who polices the system? I see rights as doing that job, and I don't just see this as an anti-system idea. It seems to me everybody needs discipline; everybody needs to impose some kind of system on their lives. You can love your system—just as you can love a person—yet still say that it needs discipline and some limits. I see rights as performing that kind of beneficial function, and it seems to me that this function should be thought of not in an anti-system way but in a pro-system way.

When we ask ourselves which of the candidates running for President in 1988 would be competent to run the system, I think we might well say, maybe nobody is competent to run the system, unless the system has a group of restraints upon it. Maybe without effective free speech and without effective limits, nobody can be competent to run the system. Maybe we've got to find these limits and enact them into law before we can expect any person to be a successful President of the United States. I think that one of the most basic needs that we have today is to regulate the system as we regulate everything else in our society. Once again we might ask "Is this something that the law can possibly do?" And I would say that the law can do it because it's already doing the other side of the job. It's already supporting what is going on now. If it's doing one side of the job, it can do the other.

We must school ourselves to be good at seeing, knowing, and understanding social reality. The biggest mistake that happens when a society is in rapid transformation is that we lose track of social reality. We get delusions and illusions about social reality, and when the law falls short, it seems to me it is mostly because of a failure correctly to perceive reality rather than as a failure of principle. One could conclude that Christopher Peterman's tragedy came from a failure of his parents to perceive reality. It seems to me that *Lochner v. New York*,¹¹ that discredited case about maximum hours for bakers, was a case of mistaken perception of reality by the Supreme Court. *Plessy v. Ferguson*,¹² holding that it's constitutional to have separate but equal facilities, was again a misperception of reality. The idea of separate but equal in the ab-

11. 198 U.S. 45 (1905).

12. 163 U.S. 537 (1896).

stract might seem valid, but segregation in reality was not equal, and it took the Supreme Court many years to recognize that reality.

As we look around the law today we see that it's in a very exciting state of ferment. There are many legal thinkers with lots of theories and the law reviews are bulging with articles proposing new ideas. All of that is very healthy and good, but one must also notice how tremendously abstract most of this legal scholarship has become today. New planets are imagined, fictitious people are invented to move there, play money is handed out for them to divide up, and abstract discussions of justice take place. I don't think there's anything wrong with this, but I do think it lacks the underpinnings of reality. What needs to be added to this ferment that is going on in the legal world is a strong dose of reality—a strong effort to seek out what is really happening in the world. Then one can use principles in an appropriate way. But what good are principles and abstractions if applied to a false reality? The smartest person, the best reasoner, the greatest logician, the most intelligent judge, will be wrong, flat wrong, if that person is wrong about reality. Ronald Dworkin,¹³ last year's lecturer here, talked about how rights trump other powers of government, and I thought that one might also say that reality trumps any theory, even Ronald Dworkin's. If one is wrong about reality, then one's principles simply are going to be misapplied.

I would like to see legal education try to find new ways to discern reality, and it seems to me those might include many different things: they might include literature, they might include philosophy, they might include economics. But jurisprudence must focus on issues such as I have raised today. Jurisprudence must focus on what's happening to real people and what's happening in a real world. I think there should be a particular concern with what might be called "middle class law"—the law of people in relationship to institutions and organizations. I think that social self-knowledge, knowledge about the kind of society we live in, is the most indispensable kind of knowledge any lawyer or judge needs to possess. It's worth noting that those judges who have been consid-

13. Dworkin, *What is Equality? Part 4: Political Equality*, 21 U.S.F. L. REV. 1 (1988); DWORIN, *TAKING RIGHTS SERIOUSLY* (1977); DWORIN, *A MATTER OF PRINCIPLE* (1985); DWORIN, *LAW'S EMPIRE* (1986).

ered truly great have all shown a sense of reality. They have also had a sense of injustice. And they have been aware of injustice. Whether it's a Black or a Warren, whether it's a Brandeis or Douglas, over and over again such judges have demonstrated that if they have a keen feeling for injustice, that will enable them to see through questions of abstract jurisprudential principle to what's happening to a particular individual, in a way that does reflect an ultimate sense of justice.

Only by this kind of approach, an approach that keeps changing as society changes, can we hope to have a Constitution that is alive and well as the rest of society. Only a living Constitution can protect us against the new wrongs and the new losses that have come to threaten our society. Wrongs set us against each other and impoverish our world. Rights bind us together and empower us all.

