

STRONG OPINIONS ON HUMAN RIGHTS

For the last six years I've been writing an editorial column for the Human Rights Interest Group *Newsletter*. Our organization, of which I have had the honor to serve as Chairperson, is one of the interest groups of the American Society of International Law. Our newsletter has been ably edited by Dr. Cynthia Price Cohen.

I've taken some fairly strong positions in these columns, and they have engendered controversy and heated "letters to the editor" in response. We have always printed these letters exactly as written (unlike some publications, we do not edit letters to the editor). Freedom of speech—especially, freedom to criticize—is one of our most precious human rights.

In this Chapter I've collected some of the editorials that may be of general interest.

I. HUMAN RIGHTS AND THE CLASH OF CIVILIZATIONS

You've probably read or heard about Samuel Huntington's article in *Foreign Affairs* (Summer 1993) about the forthcoming clash of civilizations. Professor Huntington fears that "Western" notions of individualistic human rights are going to be threatened in decades to come not by wars but by different world cultures whose populations far outnumber ours. He fears that if we promote the universality of "our" human rights, we will merely end up promoting clashes of civilizations and backlash movements in other countries.

Seldom has one person so effectively combined defeatism with moral relativism. The only rival that comes to my mind is the earlier Samuel Huntington who believed that the Soviet Union would last forever. He advised us to learn to live with eternal Cold War.

Is there any pragmatic basis for us to fear the forthcoming "clash of civilizations"? Let me propose the following test case. Set up a temporary exchange between, say, an eighteen_year_old single American woman and her Saudi counterpart. Each would live in the other's country for two or three years, and then go back home. Then ask each of them their honest views. I think the outcome of this experiment is uncontroversial. I know what it would be because I've been advising, for the past five years or so, various American women who have married Arab men who were students in the United States and then gone to live in the husband's home country. The outcome of my proposed experiment is that in at least 999 out of 1,000 cases, both the American teenager and her Saudi counterpart will embrace the "Western" human_rights program and resent if not fight the "Islamic" alternative. But you don't have to take my word for it. Just note that in most Arab countries, women are not allowed to travel abroad unless their fathers, or then their husbands, sign documents allowing them to do so. Very few do. The men are often well aware of "Western" values, and they simply do not want to expose "their" women to these values for fear that the women will become militant against regimes that reduce them to second_class citizenship status. (Compare also the crackdown by the Chinese government against young human_rights activists—restriction of their study abroad.)

If the pragmatic experiment had a different conclusion, I might start to read Professor Huntington with interest. But the fact is that I am confident in the vitality of the individualistic values that Huntington terms "Western." The Saudis and Chinese are not confident in their own values; but I'm confident in ours. They are not in favor of experiencing other cultures; I am. They are the ones who (along with Huntington) fear the clash of civilizations; I welcome it.

But apart from pragmatic calculations, I suggest that we rethink the broad notion of culture and civilizations. Scholars are increasingly demonstrating that the more we find out about "other" cultures, the less monolithic they appear. It's only our relative ignorance of them that allows us to make sweeping Huntingtonian generalizations. For example, scholars from within Islam (*e.g.*, Fatima Mernissi) and without (Ann Elizabeth Mayer, a member of our own Human Rights Interest Group) are demonstrating that it is not the teachings of Mohammed that relegate women to second class status but rather the corruption of those teachings by a patriarchal society. (This line of scholarship, of course, has revolutionary implications in Islamic countries!)

For my money, I'm more of a "deconstructionist" than any of the people writing in these areas. I don't believe that any theological doctrine has any significant effect on human life (whether there is an effect on human afterlife is not within my expertise or experience). Mohammed's teachings may be interpreted one way or the other; so may the teachings of Jesus Christ. (Even when a religion has an Official, Infallible Interpreter—such as the Catholic Pope—the interpreter's message can be garbled at will by subordinate officials within the church's hierarchy.)

I think that Huntington's forthcoming clash of civilizations is not much more significant than the forthcoming clash of pop music. All it will really produce, to paraphrase Stanley Fish, is personnel changes in various academic departments, new course headings, and new books for the library. If Samuel Huntington combines defeatism with relativism, I plead guilty of combining optimism with deconstructionism.

II. STATUS OF WOMEN IN ISLAMIC COUNTRIES

In the previous essay I talked about comparing "western" with "traditional" human rights, using a specific example of the status of women in Islamic countries. Now I'd like to expand that topic to the huge question of human freedom. I'm prompted somewhat by my current rereading of Ayn Rand's *The Fountainhead*, which I'm enjoying even more than when I first read it thirty years ago. Rand strikes many people as a little too "right wing"; if this is an objection, I'd suggest you also read Karl Popper's *The Open Society and its Enemies*. Popper gets to the same fundamental issues from the "left_wing" perspective. The important thing is that Rand and Popper are in complete agreement about the absolute primacy of human autonomy. Perhaps it was easier for Popper to be an individualist—he was born in Vienna in 1902 and spent his creative years in London. Rand was born in Russia in 1905 and grew up under Soviet collectivism. She had to find her own voice to rebel against the system. She managed eventually to emigrate to the United States. One of my favorite stories about Rand was when she briefly engaged in political campaigning in New York City in 1940. Her soap box oratory was compelling although delivered with a Russian accent. A heckler from the audience said, "Why should we listen to you? You're a foreigner!" She coolly replied, "Yes, but I chose this as my country. You were born here—what did you do?"

This story underscores the critical significance of choice. What is human freedom other than the ability to choose and to act upon your choice? Well, there is one other element, although perhaps it is implicit in the notion of choice. The other element is knowledge of the choices that are available. If a person were brought up from infancy in a closed room, that person might believe that "freedom" consists in the decision to walk up to eight feet in any desired direction. The person is subjectively free, but subjective freedom surely isn't enough. As Isaiah Berlin so thoughtfully put it:

If degrees of freedom were a function of the satisfaction of desires, I could increase freedom by eliminating desires as by satisfying them. I could render men (including myself) free by conditioning them into losing the original desires which I have decided not to satisfy.¹

¹ Isaiah Berlin, *Four Essays on Liberty* xxxviii (1969).

What is it in the world that tends to block out knowledge of choices? What is it that tends to dull many people into accepting their own situation in life, even if they didn't choose it? We all know the answer. The classicists called it "ideology." But that term doesn't carry enough punch for the present day. Why don't we call it "culture"? Or "religion"?

Where did all this cultural and religious ideology come from? People weren't born with it; it's an all too human invention. To be sure, there's a great deal that's very rich and ennobling in the culture that sweeps over us like a tidal wave. A great many streams of human ingenuity have fed into it. Yet it has been twisted and distorted to serve the ends of some people, people who did not create the content of the culture but rather spent their time modifying and distorting it to their own purpose.

The purpose that these people had in mind—and this is my present thesis—was the purpose of achieving power over other people. Power has been said to be the ultimate aphrodisiac—at least for those who are turned on by it and who dedicate their lives to achieving it. Long ago the seekers of power realized that brute personal force isn't enough to attain much power. What you need is to get others to believe a bunch of stuff that, if they believe it, they will defer to you.

The high priests of religions all over the world—big religions as well as start-ups—achieve power over their followers by swamping their brains with religious rhetoric. Fundamentalist Islamic countries brainwash girls into believing that boys are the rightful makers of decisions, and when these women grow up their husbands gladly assume the role of absolute decision-maker.

Some people think that the way to empower people who are now helpless is to suppress the ideology. Those who would criminalize "hate speech" are among the adherents to this approach. Radical feminists who want to outlaw pornography can also be found in this crowd. But not Ayn Rand. Although she personally found pornography disgusting, she said that the last thing we should ever do is ask the state to regulate it. I'm sure she felt the same about hate speech. For there will always be ideology, there will always be culture, there will always be philosophies of salvation. The last thing you should ever do is permit regulation of that culture, because the regulators will inevitably be power-seekers who will modify the prevailing ideology by imposing an even more stifling one upon the public. Politicians are pure power-seekers; many are censors at heart, wishing to stop this or that dangerous idea. Thought-control is the cheapest and most effective way to achieve power over others. Once we allow them to control unwanted thought—for example, pornography—they'll keep going and control more and more thought that the majority doesn't want. Soon we won't know what the majority wants, because only the thought-controllers will be defining for us what is right for the majority to believe.

Pervasive ideology that numbs people into accepting limitations on their freedom can only be combated by rigorous counter-ideology in the marketplace of ideas. Free speech is the most potent weapon ever invented to combat power. It is also a most fragile weapon—we have to exert effort to save the idea of freedom of speech, and we have to fight down the impulse to ban speech that we personally find disgusting or unpatriotic or blasphemous or obscene.

The first thing the military does when it stages a coup is to take over the television station. Religions have lists of "banned books" that the faithful must not read.

People who want to run your life start by controlling what you think. The better that they are in the art of bullshit, the more they may succeed in getting you to believe that the ideas are your own.

III. HUMAN WELFARE AND THE GLOBAL ECONOMY

The effect of the global economy on human rights is a vast subject, but you wouldn't know it from the very few essays that have been published. I wrote one of those essays at the height of the cold war, back in 1979, taking the radical position at the time that international business organizations should in their self interest support international human rights.² I argued that there was an underlying affinity between the free atomistic behavior of firms in the global market and the free choice of individuals in a rigorous human rights regime. Although I discussed various "economic" and "social" human rights in the essay, my prime focus (perhaps conditioned by the cold war) was on political rights and freedoms.

Today I would like to look at the other side of the coin and take the position that the burgeoning global economy is good for the economic and social rights of individuals. Accordingly, let us focus on people at or below the poverty line in developing and in developed countries. How is the global economy going to benefit them?

There isn't much controversy with respect to poor people in developing countries becoming better off by international trade. Chinese workers today make less than a dollar an hour (in US equivalent dollars); will they ever make more, or will they just be exploited by the rising industrial barons in China? The fact is that an almost iron law of economics guarantees that their wages will rise over time. The Chinese economy today is labor-intensive; to the extent that it sells its cheap labor products to a country like the United States, it acquires purchasing power in the form of dollars. It can either save these dollars³ or eventually use them to purchase goods from the United States. The goods it will eventually purchase from the US are high productivity goods⁴ which when received and used will raise the standard of living of Chinese workers. When a nation's standard of living rises, its "real income" rises. The real income of Chinese workers will eventually rise to today's level of the real income of today's Japanese workers. Recall that after World War II, Japan was in the same economic situation that China is in today—an abundance of cheap labor. Over time, Japan exported goods based on this cheap labor; this money flow to Japan inevitably raised the salaries of Japanese workers to the point where, today, they are paid roughly the same as American laborers (indeed, in recent years, several Japanese automobile manufacturers have set up plants in the United States south to take advantage of cheaper US labor!) This same pattern will, over time, raise the real income of Chinese labor. Although today there is widespread poverty in China, over time this poverty will tend to disappear, just as it has disappeared in Japan.

No true advocate of international human rights can be opposed to the eradication of poverty in China or in any other country. Many beneficial effects accompany a rise in standard of living: smaller families, greater concern for environmental standards, opposition to war (the smaller the family, the more parents resist having their children being conscripted to fight an aggressive war). Surely no international minded person can be opposed to these beneficial effects.

And yet opposition can be detected on the part of those who are captivated by

²See Anthony D'Amato, *supra* Chapter 7.

³By saving the dollars, China is in effect investing in the US economy (savings equals investment).

⁴There is no point in China importing from the US cheap_labor goods that it can better produce at home.

images such as Ross Perot's "giant sucking sound" of American jobs going south to Mexico or Pat Buchanan's advocacy of trade barriers to keep out cheap labor imports. If there were any sound economic reason behind these images, then we all ought to be concerned. In fact, they are nonsensical.⁵ Suppose a store opens in your neighborhood that offers better goods or services at lower prices. In what way does the opening of this store harm you? Obviously, if you choose to shop there, then the store can only help you. It helps you by increasing the purchasing power of your money; you get goods or services you were already predisposed to buy, and you don't have to pay as much for them. The same thing is true if a foreign country offers its goods for sale in US markets. We are all better off by virtue of these imports, which increase our standard of living by giving us the goods that we desire at lower prices.

Now, it is true that if we buy a better and cheaper automobile from a foreign country, we are foregoing the purchase of a less good and more expensive Detroit made car. Thus, the workers on the Detroit assembly lines will get less income because we did not purchase one of their cars. So, it is true as an immediate consequence of our buying an imported car that we lower the wages of American auto workers. From the point of view of the worker in Detroit, she is not altogether mollified by the fact that she also can buy a better and cheaper foreign car for herself. While this latter fact does increase her real wages, the increase in her real wages is more than offset by the lowering of her actual wages due to the fact that her specific job is being challenged by the importation of automobiles made abroad by cheaper labor.

But what is true for the Detroit auto worker herself is not true for the American economy as a whole. The American economy—our standard of living—has increased by the increase in real purchasing power due to the importation of foreign better and cheaper automobiles.

Next, we ask what has happened to the \$20,000 you paid for your new Toyota. It winds up in the hands of Toyota of Japan. Toyota has \$20,000 with which it can purchase American goods. Now, maybe Toyota simply puts that money in a Japanese bank. In that case, Japanese companies have a trade surplus. They own \$20,000 in American dollars (their trade surplus) while \$20,000 of American money has left this country (our trade deficit). Now, I ask you to look at this example in a realistic way—a way which our newspapers and media never do. Who's ahead, the US or Japan? Clearly, the US is ahead. We have imported an actual, useful product (a Toyota automobile), and "paid" for it with engraved paper. If Japan never uses this paper to purchase US goods, then we are net ahead one automobile. As Paul Krugman says with disarming simplicity, you win in the game of international trade if you import more than you export. After all, the only reason you export is to gain foreign money in order to buy things you want. If you manage to import more than you export, then the net balance of goods and labor is in your favor. You get richer; your standard of living goes up.

All right, what happens when the day comes when Japan decides to use its American dollars to buy things from us? At that point, we get the benefit of new demand for our industrial output of almost windfall proportions. Japan is going to import from us the things that we can make better and cheaper than they can make them—let's say, Hollywood films or computer microprocessors. And so we have an economic boom.

Some readers at this point will say that this story is Panglossian. I'm first saying that we win by import so much from foreign countries that we have a trade deficit. And next I'm saying that we win again when we start exporting a lot so as to reduce that trade

⁵For a logical demonstration of this assertion, I urge you to read either or both of Paul Krugman's recent books on international economics. Paul Krugman, *Peddling Prosperity* (1994); Paul Krugman, *Pop Internationalism* (1996).

deficit. How can we have it both ways?

Ricardo pointed out early in the nineteenth century that we indeed can have it both ways. That's why international trade works; that's why it happens. When you boil all international trade down to its fundamentals, what has happened is that any given nation winds up importing those goods that can be manufactured better and more cheaply abroad, and exporting those goods that it can manufacture better and more cheaply at home.⁶ This is true for *every* nation. Trade is a win-win situation. It is not, as President Clinton and his advisers tell us, a "competitive" situation. It is not a zero-sum game.

I know this conclusion may not convince you, especially if you have read this little essay rapidly. All I can ask is that you go back, put in your own numbers, and work it through. And if you want to look into the matter more thoroughly, read either or both of the previously cited books by Paul Krugman.

Nevertheless, we cannot ignore the internal effect on the American economy due to international trade. The wage reduction suffered by our Detroit assembly line worker is real. Although the American economy as a whole has benefited from foreign trade, there are displacements within the American economy. These days, the biggest displacement is between the class of unskilled laborers and the class of skilled laborers. The price of skilled labor keeps going up; the price of unskilled labor keeps going down. But the net effect is zero (because, eventually, we will be called upon to export the products of our skilled labor to countries which now have a trade surplus with the US). Despite President Clinton's false rhetoric of "competitiveness" in international trade, he is exactly right that the most important thing for American labor today is skills-training. We have to gain in productivity what we cannot produce at dollar-an-hour wages.

My conclusion is that human-rights advocates should favor without reservation the increase and flourishing of international trade because it raises the standard of living of the poorest people in the world today—people in other countries. Although there are displacement costs within the American economy—a shift between skilled and unskilled labor—the benefits to poor people in other countries and eventually to the comparatively richer but still poor people in the United States will make up for and exceed these internal displacements.

IV. HOW MUCH DO WE VALUE PROCEDURAL JUSTICE?

Michael Fay, an American teenager visiting in Singapore, allegedly assisted in spray painting graffiti on one or more public buildings. For this he was arrested and sentenced to a public caning. The most visible issue for the American media is whether the punishment of caning constitutes unlawful torture under international law. It would appear to fit the definition of torture contained in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Did the nine day "police interrogation" of Mr. Fay, leading to his signed "confession," also constitute torture? The answer is less obvious because, at this writing, we only have sketchy information as to the facts of the interrogation. A *prima facie* case of torture, at least, can be made out by reference to the same Article 1.

But these questions are only partly related to the human rights issue in the case that I believe is the most important: whether Mr. Fay was innocent of the crime for which he was punished, and how much we value procedural justice in his case and in every case.

⁶Economists will recognize this Ricardan thesis as the doctrine of comparative advantage.

In my experience in litigating or counseling in cases of claimed innocence, I find that the first and most important step is to reduce the psychological distance between the subject of our discussion and the listener (whether it is the media, a judge, or any other). The very statement of Mr. Fay's case creates a psychological distance. A listener will probably say, "well, I wouldn't spray paint public buildings or cars in this country, let alone any foreign country. Anyone who does those things deserves what he gets." Stated in this fashion, the psychological distance—the fact that most people cannot *imagine* that they would spray paint public buildings—probably accounts for the fact that a majority of Americans who were surveyed by the media said that they were in favor of Singapore's punishment of Mr. Fay.

Now let me shift for a moment to a quite different situation that has nothing to do with spray painting. Since most of my readers probably travel abroad, let us suppose that you are going through customs in some foreign airport. The officials ask you what you're carrying and whether you owe any customs duties, and you answer their questions. They politely ask you whether you mind if they check some of your luggage, and you say you don't mind. They open a suitcase and fish around under the clothes. Right before your eyes, they find under your clothes a cellophane bag containing white powder. Then they find another such bag. They place the bags on the counter. An official slits open a bag and tastes the contents. "Cocaine," he announces. Right away you say that you didn't put those things in your suitcase and you don't know how they got there. The official nods politely, but asks you to step inside the office and answer a few questions. You go inside an office and wait. You notice the customs officials taking the bags and handing them to an official. After a long wait, the officer in charge asks you questions: where you've been, where you are going, etc. You tell him you have no reason to do anything illegal, you've never done anything illegal, and somebody must have put the cellophane bags in your suitcase. The official says, "Well, I have no particular reason to doubt you, but you must understand that everyone we catch who is smuggling narcotics says the same things you've just said. Not all of them turn out to be innocent. We must detain you and book you for a possible crime. Don't worry, if you're innocent the magistrate will release you shortly, with our apologies." You ask what the penalty would be for smuggling the items that are in your suitcase.

"At least twenty years in prison," he replies.

You are politely but firmly arrested. You are told that you will be allowed a phone call by the magistrate. You are placed in a van; you don't see where they take you. You come out of the van in some kind of armed compound. You are escorted into a building. You wait again, a long time.

As you think about your situation, several words pop into your mind: "Kafkaesque," "this is outrageous," "I'll sue all these people," and so forth. You may, or may not, know about the general situation of which your case is a part. A tactic that drug smugglers use—we don't know how often they use it—is to smuggle narcotics across borders in unsuspecting tourists' luggage. At some point when you left your luggage unguarded—at the airport, or in the back of a van going to the airport, or with the bell captain at your hotel—someone inserted the bags of cocaine. Since you don't fit the profile of a narcotics smuggler, there is a good possibility that you'll get through border security. If you do, someone will be waiting at your destination to steal your suitcase. You'll report your suitcase missing; later it will turn up somewhere, the contents will be intact, and you will be none the wiser. On the other hand, if you are caught in customs with the narcotics, the smuggler simply loses a couple of bags of cocaine and you may lose twenty years of your life. From the smuggler's point of view, it's a lot better than *him* losing twenty years of *his* life.

Finally you are ushered into the magistrate's office. He patiently goes over all the questions again: your age, where you were born, where you moved to, your education, your friends, your family, your relatives, trips you've made, and in great detail, what you've done every hour for the past few days. You protest; he says, "we have to check out your story. We can't let you make any calls until we've verified what you've told us." You are ushered into a cell.

Now you are treated to a series of interrogations by different officials. Some are polite; some are belligerent. The questioning continues. You are given very little to eat or drink. At times you fall asleep, and you are rudely awoken. You may even be struck if you start to fall asleep. The light in your cell is continuous; you lose track of day or night. Some interrogators come in with "evidence" that your "accomplices" have done this or that, and you deny any such thing. You ask for a lawyer. Finally, many hours (or days?) later, they tell you that a lawyer is coming.

The lawyer comes to your cell. He (or she) is a local attorney. He expresses great concern for your well-being. He asks how you have been treated. When you protest, he sympathizes with you, but points out how other prisoners have been treated, and suggests that somehow you are getting the highest consideration. He also asks you all the same questions, and promises to come back.

A day or two later, during which you have been continuously subjected to interrogations and you are deathly tired and on the verge of losing contact with reality, the lawyer comes back. The good news, he tells you, is that the police have not been able to track down any accomplices and co-conspirators. But the police, he tells you in a manner that suggests he's sharing a confidence with you, are fools. They believe that if they have been unable to find your accomplices, you have simply been too clever. You're an educated person. You are intelligent. You are clever enough to have hidden your tracks. You are clever enough to smuggle narcotics and yet have a plausible story to tell if you are caught. You have made sure that nothing links you to the members of whatever mob you work for.

"That's crazy!" you say. Your lawyer nods sympathetically.

You say: "The only evidence against me is that the stuff was found in my luggage. There is no evidence that I put it there."

Your attorney replies, "I know that and you know that. And even the judge will know that. But here's the problem. Under our law, if stolen goods are found in your possession, or narcotics in saleable quantities are found in your belongings, then you have the burden of showing that you did not put those goods there."

"You mean, guilty unless proven innocent?"

"Perhaps. Take your country, for example. There are some states in the United States where the criminal law provides that possession of stolen goods shifts the burden of explanation to the defendant. It's not that uncommon a proposition."

"But how could I prove that I didn't put the narcotics in my suitcase?"

"Did you ever let the suitcase out of your sight?"

"Yes, as I told you before. At the hotel when it was with the bell captain, on the way to the airport when it was in the back of the van, and at the airport where the airport valet service took the bags into the terminal for me."

"But before you went into customs, you didn't check through your luggage, did you?"

"No. Why should I? I had no reason to think it had been opened. Besides, my clothes are carefully packed, and I didn't want to disturb them."

"Yes, very likely. But, you see, the prosecutor will say you were negligent in letting the suitcase out of your sight. Either you were negligent, or you deliberately let

the suitcase out of your sight so that your accomplice could pack it with the narcotics and not be close to you when he did it. That way, if he was caught packing it in, you wouldn't be implicated."

"You know it wasn't deliberate. If I acted negligently, so what?"

"You were in possession of the narcotics. If your suitcase hadn't been opened by our alert customs official, a huge quantity of narcotics would have been illegally smuggled. If on top of that you were negligent, you don't present a very appealing picture to the court."

"You mean I could be convicted?"

"I'm afraid so."

"That's outrageous! What is my family doing about this? What is my government doing?"

"I'm in contact with them. Of course your family believes in you, as I do. Your government is not so sure. You know, they don't take kindly to Americans who are involved in criminal matters. Especially in the narcotics field. Your government is anxious that my government do everything it can to stop narcotics smuggling. So your government is not in a position to complain if we arrest one of their own citizens."

"They're not even complaining?"

"They've raised the issue. But they're waiting to see what the court does."

"If the court convicts me—"

"My friend, in my sincere judgment, you will be convicted."

"You're the lawyer. What should I do?"

"We could try to get a plea bargain."

"Such as?"

"You plead guilty to the crime. If you do it right, and you express your sorrow in open court, I can get you no more than five years."

"Five years in prison?"

"Better than twenty years. It's your choice, five or twenty."

"This is terrible. I don't know what to say."

"Look, my friend, this is the only time I will be able to talk with you before you appear at trial in open court. I'll proceed on the assumption that you want to plea bargain, and I'll do everything I can to get the deal for you. I'll tell you in court just before your case is called whether I've been able to get you the deal. In the meantime, the police may want to get a signed confession from you."

"A confession to a crime I didn't commit?"

"Don't worry about it. The confession won't be used against you in court. I'll see to that. If the prosecution tries to use it, I'll say it was coerced. Don't worry, I have had hundreds of these cases. The confession will not be used. If I were you, I'd just sign it and forget about it."

Your lawyer leaves. The same routine of interrogation resumes. Hours or days pass; you've lost track of time. Then the "brutal" interrogating team visits your cell. They hand you several sheets of paper. It is your typed confession. They give you ten minutes to read it. You read it, with eyes swimming and vision blurred. The "confession" details how you are part of a named criminal organization. Your accomplices are named—more than a dozen names appear in the document. You confess to having smuggled narcotics eight times before this time, when you were finally caught.

"These are all lies," you say. "I don't know any of these men. I've never heard of them. How can I sign this?"

The answer that you get is that you are punched in the stomach. You double over in pain. You hear your interrogator saying, "the names are all known narcotics

smugglers. We have some of them in prison. We're trying to catch the others. They're all guilty. Your signing this confession doesn't tell us anything we don't already know."

You refuse to sign. They take your belt off from your pants. You are told to slip it as a noose around your neck; you refuse and they hit you again. So you do it. They force you to stand on a chair and tie the end of the belt to a pipe in the ceiling of your cell.

"Now," your interrogator says, "all we have to do is to kick away this chair and you are instantly strangled to death." He taunts you by kicking at the chair, but not kicking it over. You panic. "Look," he says, talking not to you but to the two guards with him, "we come into this cell, and see what our friend has done? He's strangled himself with his own belt. Another suicide. Too bad."

A few hours later, your "friendly" interrogator comes in and tells you about the numerous suicides they've had in prison. "They've all hung themselves, one way or another," he says, smiling. "We'll tell your family we're very sorry you decided to take your own life. One of those unfortunate things. Now, if you cooperate and sign the confession—"

Either at that point, or in a day or two of further interrogations, you sign. After all, you can always say later that the confession was coerced. It's a pack of lies. But you also see that these police officials aren't afraid to murder you. They aren't afraid to beat you. You'll never last twenty years in prison. Five years begins to look quite attractive, compared to twenty.

A few days later the interrogations stop and the light in your cell is turned off for the night. Some decent food is finally brought in to you. You rest and rehabilitate yourself for a couple of days. Then you are taken to court. Your appointed attorney meets you and says that the plea bargain has been worked out if you agree to it. You say you agree. You plead guilty to the judge. No surprises. You are sentenced to five years. You are led away to the prison.

Could this happen to you or to me? Of course it could. Does it happen to innocent people? Yes it does. It happens rather often. Did something like this happen to Michael Fay? By the time you read this Newsletter, we may all know a lot more about the Fay case than we know now. But on the basis of public information at the time of this writing (May 17, 1994), I think we can say that something like this may have happened to Michael Fay. The evidence against him was that the spray paint materials were found in his dormitory room. Another person in the same dormitory clearly committed the crime. That person was the son of a foreign diplomat. He enjoyed diplomatic immunity, and hence was not prosecuted for the crime. What was Michael Fay's involvement? Was he just the innocent recipient of the evidence? Or did he do a tiny amount of spray painting himself? Or did he know about it when it was happening and fail to inform the police? At this point, all we know is that after nine days of police interrogation (could you or I last nine days?) he signed a confession. In open court he pleaded guilty. Another American, 16-year-old Stephen Freehill, has also been charged with damaging cars. The problem is that Mr. Freehill, while in police custody, signed a confession stating that he had committed the crimes on specified days. But now it has been shown that on some of those days, Mr. Freehill was not in Singapore. With all the publicity given to the Fay case, it is possible that Mr. Freehill will be released. How could Freehill have signed an obviously false confession? Was Fay's "confession" similarly false? I think I've shown, in the imaginary story I told, how such a false confession can be obtained from an innocent person.

Does this sort of thing happen only in foreign countries? Unfortunately, no. Maybe it happens less frequently in countries like the United States, but the underlying

psychological dynamics are such that it does happen here. Just look at the movie, *The Thin Blue Line*. A police officer in Texas was brutally shot on the highway. The officer's family cried out for vengeance. A "drifter," Randall Adams, who had nothing whatsoever to do with the crime, was arrested. The police checked out the area of the crime. The closest establishment to the scene of the crime was a diner. The police checked out all the people working in the diner, and found that they had some potential leverage against one of the waitresses. Although she was not looking out the window at the time of the murder, and although *she could not have seen anything in the dark even if she were looking out of the window*, the police showed her a picture of Randall Adams and said that if she would testify that she saw him shoot the police officer on the highway, the prosecutor would release the waitress's sister. The waitress's sister was about to be indicted for a major crime. So the waitress testified against Adams, her sister was let go, and Adams went to prison. Many years later the movie came out, and a Texas judge—without any precedent or any basis in anything in Texas law—summarily released Mr. Adams from prison. Clearly Mr. Adams' continued presence in prison wasn't making Texas look good. But Texas did something else in addition to releasing Mr. Adams. A ban was enacted on any further movie- making regarding convicts in prison.

I spent five years on a similar case in Chicago. My client was in prison for a crime he allegedly committed many years before. Dr. John Branion, who had protected Martin Luther King Jr. during a violent civil rights housing march in Chicago, came home from the hospital one morning to find that his wife had been brutally murdered. At the time of her murder, which was established by the next door neighbor who heard the shots, Dr. Branion was treating patients at the hospital. The police had no clue as to the identity of the murderer. But it was a notorious case, and the police decided to arrest Dr. Branion. At his trial, evidence was produced by the prosecution showing that Dr. Branion was in the hospital when the crime was committed. Nevertheless, a clever prosecutor bamboozled the jury and Dr. Branion was convicted. For the complete story of his case, read my wife's book entitled *The Doctor, the Murder, the Mystery*. It won the Anthony Boucheron award as the best true crime book of 1992, and recently won the Malice Domestic award for the best recent true crime book. The author is Barbara D'Amato.

I filed a *habeas* petition on behalf of Dr. Branion in federal court. I succeeded in getting jurisdiction on some highly technical and contentious habeas issues. Surely at this point, you would say, as I did, that no federal judge would uphold the conviction of a man who was not only probably innocent, but the proof of innocence was contained in the evidence that the prosecution (not the defendant) presented at trial. Wrong.

The district court judge, Susan Getzendanner, distorted the facts, twisted them around, and threw in a few made up facts of her own, in an opinion concluding that, while she might not have found Dr. Branion guilty if she had been on the jury, the jury was entitled to find him guilty based on the evidence presented to them. I saw her in the hall of the court building after her opinion was handed down, a couple of weeks before she left the court to take up a partnership at the prestigious Chicago law firm of Skadden Arps. I looked at her straight and blurted out the words that I could not stop myself from saying: "Shame on you!"

I took the case to the Court of Appeals. His opinion was a rehash of Getzendanner's, although stylistically superior. To take one example among many: if a victim is first battered by the assailant, and then shot, the bruise on the skin will remain as it was at the time of death. The bruise will not continue to "develop," because bruises develop from the pressure of blood from the heart flowing into the capillaries of the skin. Therefore, if a person is bruised and then shot, a coroner can determine from the extent of

the bruising the amount of time between the battering and the shooting. The coroner in Dr. Branion's case, testifying for the prosecution, estimated that the battering (actually, a semi-strangulation) took place fifteen to thirty minutes before the victim was shot several times through the heart. But fifteen minutes to thirty minutes before the victim was shot, Dr. Branion was treating the last few of thirteen morning patients at the hospital. Judge Easterbrook was fully aware of the scientific evidence about bruising and the coroner's testimony, because all of that was in my brief. Yet in his opinion, he said that the jury was rationally entitled to believe that the bruise on the victim continued to develop after she was shot. (This, as I say, was only one of the numerous ways that Judge Easterbrook twisted, distorted, and misstated the state's own evidence in the case.)

I gave a paper at a justice symposium at Cardozo Law School contending that Judge Easterbrook deliberately misstated the facts of the Branion case in order to find him guilty of a crime he could not possibly have committed. My contentions were repeated in a column "At the Bar" in the *New York Times*, and Judge Easterbrook was invited to reply. He declined to do so. I also gave a talk on the Branion case to the Inns of Court in Chicago, consisting of prominent judges and members of the bar. We invited Judge Easterbrook to come and defend his position; he did not come. None of the judges in attendance, who knew Judge Easterbrook very well, took issue with anything I said. One or two of them said, "well, I don't do these things in my court." My Cardozo talk was later published with footnoted citations in 11 *Cardozo Law Review* 1313 (1990). The Supreme Court turned down my petition for *certiorari*; they had better things to do with their time. I went to Springfield to argue clemency for Dr. Branion on the grounds not that he had suffered enough for his crime, but that he clearly did not commit it in the first place. Dr. Branion got very sick in the hospital and was close to death when the governor of Illinois pardoned him. He died a month later in the hospital.

Why are innocent people convicted? I'll give you my best two reasons: infallibility and deterrence. Many judges want the public to believe they are infallible. They are willing to send innocent people to their death in order to avoid admitting that the judicial system made a big mistake. Many police officers share the "infallibility" syndrome, but they may be more motivated by deterrence. There is no question that crime can be deterred by fear of punishment, but what many people fail to realize is that deterrence has two components: the probability of being caught plus the severity of the punishment. The higher the probability of being caught, the more the deterrence. The same isn't true for punishment: increase the punishment and deterrence does not automatically increase. With these considerations, it was not so much the caning of Michael Fay that contributes to the safe streets of Singapore, but rather the efficiency and rapidity that characterized his capture, arrest, confession, and punishment. If the public gets the impression that the police are super-efficient, would-be criminals among the public will be deterred. Countries like Singapore and Japan have the public image of efficient, indeed ruthless, police forces. No crime goes unpunished, in the public mind. As a result, their streets are safe.

This brings us to the real dilemma for human rights. We can have safe streets if we are willing to tolerate *Gestapo*-like police methods (including torture of arrested persons) and are also willing to accept a certain number of convictions of clearly innocent persons. After all the police, whether in Singapore or anywhere else (except perhaps Texas), *try* to arrest guilty persons. Their first impulse is to arrest the guilty, not to arrest the innocent. But if the state that employs them wants them, at all costs, to make their arrests within hours of the commission of the crime, and then to make sure that whomever they arrest is found guilty and punished—all in the name of creating a public atmosphere of air-tight deterrence—then mistakes are going to be made.

How highly do we value procedural justice? Michael Fay's case seems to present us with a case of substantive justice—whether caning him constitutes unacceptable torture. But below the surface lie even more intricate questions of procedural justice. I've tried to indicate what some of these questions are, but my main message in this lengthy letter to you is that innocent persons who may be arrested and convicted are not just "them"—they may be us. How much do we value procedural justice when our own necks are in the noose?

V. SHOULD PROSTITUTION BE CONSIDERED AN INTERNATIONAL CRIME?

We rarely face the question of deciding whether an given right is or should be an "international human right"; most of the time we are concerned with the implementation of rights that are in themselves not problematic. But here I want to talk briefly about one of those rare questions.

Should we have an international prohibition against prostitution? Clearly there are some forms of prostitution that are non-problematic violations of human rights, such as child prostitution, forced prostitution as an aspect of torture, punishment, or cruel and inhuman treatment, prostitution that involves mutilation or other destruction of bodily integrity, and prostitution as incident to slavery or the slave trade. Although these forms of prostitution are grave violations of human rights, let us place them to one side and, for present purposes, concentrate upon prostitution by women or men who freely consent to engage in that practice for financial remuneration.

In feminist literature there is a deep schism regarding consensual prostitution—so deep that the subject is largely avoided or finessed by the leading writers. The dilemma is clear. On the one hand, an adult person is entitled to do what she wants with her own body, and the state has no business interfering with her privacy and her freedom of choice. On the other hand, female prostitution is degrading to women, it subordinates them, and it exploits them. (Less is said about male prostitution being degrading to men, although one can imagine contexts in which this would clearly be true as well.) Some leading feminists, such as Catharine MacKinnon, seem to attack prostitution indirectly by their condemnation of pornography. They regard pornography as degrading to women, and appear (though I may be wrong about this) to use their arguments against pornography as surrogates for a wholly implied case against prostitution. Both the preparation of pornographic materials and the practice of prostitution are consensual behaviors (except in their juvenile or coercive forms that should be placed to one side in this discussion), and therefore it is easy for the reader to transfer the arguments from pornography to prostitution. But even feminists who attack pornography seem to have a difficult time dealing with the freedom of actresses and models who are paid for their work in pornographic films and photographs. Are these persons not entitled to engage in that line of work? In short, is it any easier to condemn pornography as a product available in an "adult" bookstore than to condemn the behavior of consenting adults who prepare pornographic materials? May we not ask whether the actors and models in the pornography industry have a right to sell their sex-related services in the same way that prostitutes have the right to sell their sexual services? The dilemma for feminists such as Professor MacKinnon is between the effect of pornography on societal attitudes toward women and the preparation of pornographic materials by freely consenting adults; they wish to condemn the former while stopping short of condemning the latter. In brief, if pornography is a surrogate for prostitution, the dilemma in the two cases seems to be roughly the same.

The schism about prostitution in feminist literature is reflected, but played out quite differently, in the international arena. The Convention on the Elimination of all Forms of Discrimination Against Women requires states to legislate against "all forms of traffic in women and exploitation of prostitution of women"(Article 6). The 1951 Convention for the Suppression of the Traffic in Persons has a little more detail about exploitation—it requires states to punish any person who "exploits the prostitution of another person, even with the consent of that person." (Article 1). Although prohibitions against the exploitation of prostitution abound, no international convention of which I am aware attempts to criminalize prostitution itself. This is true of the most radical proposed convention on the subject of prostitution, the NGO-sponsored draft Convention Against Sexual Exploitation.⁷ In Article 1 it defines sexual exploitation as

a practice by which person(s) achieve sexual gratification or financial gain or advancement through the abuse of a person's sexuality by abrogating that person's human right to dignity, equality, autonomy, and physical and mental well-being.

Calling upon states parties to "punish perpetrators of sexual exploitation and redress the harm done to victims by developing penal, civil, labor and administrative sanctions," the draft Convention in Article 5 makes it clear that the perpetrator can include "the husband." Even so, the real battleground between this draft Convention and the familiar international conventions on the rights of women pertains to the question of regulating and licensing prostitutes. The latter conventions say nothing about the subject. In many discussions I have heard on this issue, The Netherlands is invariably cited as the most "progressive" state on the subject of regulating prostitution. Recognizing that prostitution will exist whether or not the state criminalizes it, The Netherlands has passed a comprehensive series of internal laws licensing, regulating, and providing for medical check-ups and care of prostitutes. It is this particular state initiative that is anathema to the proponents of the draft Convention Against Sexual Exploitation. That Convention provides in Article 6:

States Parties reject any policy or law that legitimates prostitution of any person, female or male, adult or child; that legalizes or regulates prostitution in any way including as a profession, occupation, or as entertainment; and agree to adopt appropriate legislation that recognizes prostitution as an acute form of sexual exploitation.

Although the draft Convention in the same Article calls for

penalization of the customers, recognizing them as perpetrators to be criminalized while rejecting any form of penalization of the prostitute,

I think that the draft Convention is unrealistic in attempting to separate the customer from the prostitute. Both are consenting adults. It is hard to imagine any state enacting criminal law against customers of prostitutes without also criminalizing the act of prostitution itself. Indeed, from the point of view of the police, it would be a near impossibility to arrest the "johns" while being told to let the "pros" themselves go free. Most instances of complaints against prostitution are investigated by undercover police officers posing as customers and entrapping the prostitute. (I defended an alleged prostitute against an entrapment operation in Chicago about fifteen years ago, and in the process got to know something about the culture of prostitution in a big city. Recently Barbara D'Amato published a book in her mystery series entitled *Hard Women*, which also looks into the culture of prostitution activities and law enforcement in Chicago.) From the point of view of the police and, I daresay, society as a whole, if you're going to arrest the "john" you have to arrest the "pro" as well. If the act of prostitution is a criminal act, then both participants are

⁷A copy may be obtained from Coalition Against Trafficking in Women, P.O. Box 9338, N. Amherst, MA 01059.

engaged in a crime. If the act of prostitution is not criminal, then neither should be arrested.

The draft Convention Against Sexual Exploitation may thus be seen to be in the same logical quandary as the feminist literature referred to earlier. The Convention attempts to protect the prostitute herself (or himself) because her act is a consequence of her rightful sovereignty over her own body. But it also attempts to criminalize every incidence of prostitution—procuring prostitutes, exploiting them, paying them for their services, and so forth—as a consequence of its perception that prostitution degrades women.

VI. THE MOST BASIC HUMAN RIGHT

What is the most important human right? In my view, "freedom," though the word needs to be defined. The definition I shall offer will lead into my main topic for this Letter: the relation of freedom to law in a world that will become increasingly dominated by multinational corporations.

The definition of human freedom that I have in mind stems from Immanuel Kant and John Milton. They were writing *in opposition* to the medieval age of conformity and thought control. For Milton the most important human right was the freedom of any person to think and talk and publish without interference from the state or from other persons. Kant agreed, but in effect reversed the formula. For Kant the most important human virtue was to refrain from interfering with the self-expression of other persons. Whereas Milton stressed freedom of speech and thought, Kant stressed tolerance of the freedom of speech and thought of others. Milton's view was rights-based; Kant's was duty-based. Both sides of the coin are needed, but if I had to choose between them, I'd say that Kant's was the more important. What we need to stress is not simply the state's role in allowing persons to speak, but rather the state's duty to prevent would-be censors from suppressing the speech of others.

The First Amendment largely reflects the views of Milton: "Congress shall make no law ... abridging the freedom of speech." A Kantian formulation of the First Amendment might be: "Congress shall ensure that the freedom of speech is protected." This Kantian version would of course include the Miltonian view: if Congress itself made a law abridging freedom of speech, it would not be ensuring that freedom of speech is protected. But the Kantian version goes beyond the Miltonian. It would create a Congressional duty to ensure the protection of speech by preventing even private abridgments. Let me just give you one illustration among thousands of possibilities of how the Kantian version would lead to a different result in present-day American constitutional law. Today, if you have a message you want to get across to the public, and you try to buy advertising space in the media (newspaper, radio/TV), the content of your message will be reviewed and the media are legally free to deny you the advertising space even though you offer to pay the prevailing advertising rates. This practice is regarded as perfectly legal on the ground that the media conglomerates are privately owned and therefore are not regulated by the First Amendment.⁸ This amounts, in my view, to an inhibition on free speech. The result would be different under a Kantian view of the First Amendment: Congress would be obliged to enact a law stating that persons in control of information flow (the media, publishers, etc.), are not entitled to exercise their personal censorship over the content of advertising. So long as the advertiser offers to pay the prevailing rates, the media would not have the right to reject the ad.

Kant's vision of the tolerant society is a lot like Karl Popper's vision of the open society. Popper wrote in opposition to the closed society, glorified in works ranging from Plato's Republic to Rousseau's Social Contract to modern-day tracts on fascism and communism. But what both Kant and Popper lack is

⁸There is of course an exception that applies to the broadcast media but not to newspapers or magazines: the "equal time" provision. If a broadcast media devotes time to a political message, it may have a government-imposed obligation to devote equal time to the opposing political view. But the broadcast media can avoid airing both messages simply by not choosing to air one of them.

a vision of the role that law should play in their versions of the ideal society.

It is easy, even facile, to view law as the heavy hand of the state that attempts to tell you what to do. In this view, law restricts human freedom. Statutory law comes at you in a shower of codes and regulations; your only freedom is to duck between the statutes. By ducking and avoiding, you are able to exercise a certain degree of human freedom—at least, until the legislature catches up to you and enacts a statute that applies to exactly what you are doing. Frederich Hayek's view of law was a lot like this. The law, to him, inhibited human freedom by getting the state into the business of telling people what to do. It also seems to have been the view of many of the framers of the US Constitution. The Bill of Rights places restrictions on the powers of government." The government is best which governs least" represents the world-view of the framers.

But now, in 1996, as we speculate on what will happen to human rights in the next century, we already have data that suggests the limitations of the framers' view of government. Simply telling governments what they *cannot* do is not enough to fulfill the aspirations of mankind for freedom. For huge multinational corporations are becoming quasi-governmental entities that can restrict our freedoms. At the same time that these corporations are becoming exceedingly rich and powerful (a number are richer and more powerful than many countries), governments are "downsizing" by allocating many of the traditional governmental functions to private companies. Multilateral corporations are rapidly taking over the functions of communications (broadcast, publishing, telephone), travel (airlines, railways, vessels), construction (highways, buildings, factories and infrastructure), intellectual property (tapes, disks, movies, television shows), food production ("agribusiness") and distribution (supermarkets), retailing (mega- malls, discount warehouses), and so on, through just about all the major facets of life. I am not worried about monopoly *pricing*; indeed, I think that on the aggregate these enormous new business enterprises are succeeding in bringing prices down and making new technologies available to the average consumer. But what I am worried about is the potential loss of human *freedom* that can come about in a world dominated by corporations that are not publicly accountable. The illustration I gave at the outset—the fact that the media is allowed to censor advertisements—is just the tip of the iceberg. What will happen in the twenty-first century when many governments are considerably weaker than they are now? Will governments even be able—should they desire to do so—to restrict corporate autonomy in favor of increasing the freedom of individuals? Or will these huge corporations "swallow" up nearly all governmental powers, and become so powerful in themselves that governments will be afraid to confront them?

Most science fiction tells us that bigger governments (a world federation, according to Star Trek) will dominate our future. We may all be taken by surprise. As we protect ourselves against the power of governments, we may wake up to find that we are powerless against huge private business enterprises. These private corporations will assure us (and they will allow no contrary messages) that everything is OK, that business is good, that people are happy, that the right thing to do to achieve happiness is to buy, buy, buy.

But the reality could be quite different. Dissenters may be suppressed, and news about their dissent may be suppressed so that no one knows about them. We may yearn for the old days when we could vote for government officials and turn out the politicians who did a bad job. In the brave new corporate world, we will have no vote on the CEO's who run our lives through the corporations that they control. (Even shareholders will have practically no voice, just as today there is hardly any effective shareholder voice in major corporations.)

My message is not that we should begin worrying about corporations. Rather, we should reassess our views about the relation of law to freedom. If laws can be the friends of freedom, we should not carry the process of downsizing governments to the point where governments become too feeble to confront private aggregations of power.

Human freedom does not mean an absence of legal regulation. The right kind of legal regulation can enhance freedom. Legal regulation that restricts the freedom of artificial entities such as corporations can simultaneously enhance the freedom of individuals. Governments have to take a proactive human

rights role as multinational corporations become increasingly powerful. We must be vigilant lest business enterprises evolve into dictatorships that have more effective power over our lives than traditional state governments.

VII. HOW IMPORTANT IS ADEQUATE HOUSING AS A HUMAN RIGHT?

Some movie producers recently decided to milk Nathaniel Hawthorne's *The Scarlet Letter* one more time. The motion picture, starring Demi Moore, made a fleeting appearance at a theater near you, and then promptly went the way of the videocassette, where presumably it will be marketed to libraries.

The problem with the movie was making audiences accept the sinfulness of Adultery. Back in the Puritan era, adultery was a big deal; today it's a ho-hum. The producers obviously found it hard to convince today's audiences that Adultery was a big enough deal to motivate a plot, so in typical Hollywood fashion they solved their problem by changing the ending. Hester Prynne, a married lady with an "A" for Adulteress on her bodice, runs off with the Reverend Arthur Dimmesdale and presumably lives happily ever after the closing credits. In the book, Reverend Dimmesdale dropped dead from remorse. By changing the ending, Hollywood made it possible for *The Economist* recently to ask whether the "A" in fact stands for Adulterated.

Why are all the usual sins so rapidly losing their punch? The self-styled Moral Majority says that it's because society has lost its way, that we have turned our back on God and family values. I disagree. I think it's because we have all become aware of vast evil in the world against the backdrop of which the usual sins seem petty. This is the century of genocidal holocaust, of mass rape, of carpet bombing of population centers, of terrorism, of systematic torture—aided by new technology and weapons that deliver death and pain with great efficiency.

When politicians such as Pat Robertson preach to us about family values, I wonder whether they are not simply diverting our concern away from Bosnia, Rwanda, and China. In Robertson's case, I think the strategy fits in with his call for raising tariff barriers, disavowing NAFTA, and withdrawing from world competition. Turning Inward is, for him, both a moral and an economic matter—a potent combination. We might do well to recall that a similar combination in 1929 (led by the Hawley-Smoot tariff) led to the Great Depression.

I think that there is an analogue in our area of human rights to the diversionary tactic of Pat Robertson and the self-styled Moral Majority. If we care deeply about human rights, we may sometimes find ourselves in the position of having to withhold our support for some human rights claims in order to apply our energies more effectively to other human rights that matter a lot more.

Let me be specific. The most important human rights (and I don't think your list will differ significantly from mine) are the negative rights: against genocide, slavery, torture, rape; and the positive rights: the rights of life, liberty, and equal consideration for employment, the right of women to equality, the right against arbitrary imprisonment (*amparo*), children's rights. So much progress remains to be made around the world in securing and implementing these basic rights that we may have to be somewhat skeptical about other rights—claims that may tend to divert attention and energy from these basic rights.

Take housing, for example. I support the proposition that shelter is a basic human need. But consider what happens when housing-rights advocates attempt to couch this need in legally enforceable language. I quote now from the Draft international Convention on Housing Rights prepared by the UN Special Rapporteur on Housing Rights, Rajindar Sachar, in August, 1994:

Article 1. All children, women and men have an enforceable right to adequate housing which is affordable, accessible and self-determined, and includes a right of access to a safe, affordable and secure place to live in peace and dignity.

Now, it's hard to disagree with the goals expressed in this draft treaty. It would be eminently desirable if we had a world where every human being (not just "children, women and men" in Mr. Sachar's quixotically restrictive language) can live in a safe and affordable house of their own choice. But how do we get from here to there? The draft treaty suggests that the mechanism is the lawsuit. Anyone who at present does not have such a house has an "enforceable right" to have one. How many lawsuits would that amount to in the present world? Three billion? Two billion? Let's be conservative and say one billion.

What if these one billion plaintiffs win their lawsuits, as they should if the draft treaty means what it says? Are the judges going to order that houses be built for these successful litigants? Are carpenters, painters, electricians, plumbers, and architects going to be rounded up and forced to build all those houses? And if they don't, will they be cited for contempt of court? Will all tradespeople become indentured laborers? What about the convention against indentured servitude?

If the houses are to be "affordable," and if a billion of them are to be constructed immediately around the world, then who is going to furnish the raw materials—the wood, the metal, the glass—when the low cost associated with each house is insufficient to pay for these raw materials? Well, perhaps governments will subsidize these homes. Perhaps governments will pay, let us say, an additional \$40,000 per house above the "affordable" price. That amount, times one billion, amounts to \$40,000,000,000,000. Throw in another ten or so trillion dollars annually for police protection so as to satisfy the draft treaty's requirement of safety and security.

What do advocates of housing rights say about all this? In an Issue Paper published by the American Society of International Law (1994), Mr. Scott Leckie, Co-Director of the Center on Housing Rights and Evictions based in the Netherlands, and legal adviser for Habitat International Coalition based in Mexico City, says this about the UN draft treaty:

The current draft is formulated in a restrained, yet comprehensive manner and its existing form would be arguably acceptable to a majority of governments and to the non-governmental housing sector. (p. 3)

Am I missing something? Maybe I just don't get it. The World Conference on Human Settlements will take place in Istanbul on June 13-14, 1996. The Article 1 "restrained" draft quoted above will presumably occupy the attention of the delegates. Will the delegates compete with one another to come up with a treaty that is stronger than Article 1? After all, if they are going all the way to Istanbul, are they going to be content with adding nothing of value or newsworthiness to the UN's "restrained" draft?

About the time that this Letter comes out, an article of mine, expressing skepticism about the legal language that comes out of world conferences will be published in the first issue of the *Transatlantic Law Journal*.⁹ It is entitled "World Conferences and the Cheapening of International Norms." The point I am making in this Letter is somewhat different from that made in the article. It's not so much a "cheapening" of legal language that I'm talking about here, but rather a diversion of energies. Even if the world could afford to construct a house for everyone, that will not necessarily do anything constructively for some of the other topics of recent or projected world conferences (such as women's rights, non-proliferation, social development, or racial discrimination), and might actually exacerbate others (world population and global environment): a housing spree might encourage larger families and also require, for the raw materials of housing construction, total global deforestation.

To repeat: I am in favor of housing. I am in favor of housing for everyone, including temporary housing for the people who attend the Istanbul conference. But doesn't the strident advocacy for "enforceable" housing subtract something from the credibility of those who are forcefully advocating the securing and implementation of other human rights?

⁹See Chapter 3, *supra*.

VIII. IS THERE A RIGHT TO DIE?

In many of these Letters I have been concerned with "marginal" cases of human rights—rights that ought to be included under the rubric "international human rights," rights that should be omitted, rights that may not be rights at all. In this last category is the Right to Die.

I've been thinking about it in connection with the trial of Dr. Jack Kevorkian under Michigan's statute (now expired) barring suicide assistance, a felony punishable by up to four years in prison. The trial is continuing as I write this Letter, and will be over by the time you read it. Dr. Kevorkian was acquitted in a jury trial.

Every year there are many suicides. Many countries make suicide a crime, but of course if the crime is successful there can be no criminal law penalty. There can be a civil penalty that would be inflicted on the suicide's heirs, such as forfeiting one's life insurance, but that kind of penalty is a matter of contract and does not rely on the criminal law. Yet the law that criminalizes suicide is by no means irrational. In the first place, it allows the police to interfere if there is a suicide attempt. A person who attempts suicide can be arrested and involuntarily committed to a psychiatric institution; this may be in that person's interest, although it is surely paternalistic on the part of the state. Secondly, there is an issue that is hardly ever mentioned in this connection, apparently out of fear that disclosing it is contrary to the public interest. Since the readers of this Letter are an eminently sane group, and since this Letter has limited circulation, I will mention it here for the purposes of full and open debate. It is that some people commit suicide by a process that involves killing others, such as driving at high speed and abruptly crossing the center line of a two-lane highway so as to drive straight into an oncoming vehicle. By making suicide a crime, suicides may possibly be encouraged to limit their choice of death to a private context.

Dr. Kevorkian administers death to his "patients" by providing them with a small carbon monoxide generating machine connected by a tube to a mask which the patients place over their nose and mouth. He has testified at his trial that he tries to talk his patients out of committing suicide, that he does not want to see any of them die, but that he empathizes with them—they are in great pain and anguish and want to end their suffering. In light of the highway example in the preceding paragraph, one might think that the state would have a rational interest in seeing to it that persons who are determined to end their lives are assisted by volunteers such as Dr. Kevorkian who will ensure that no harm comes to any person other than the person who has decided on suicide.

Thus, as I try to analyze this situation, I am led to the conclusion that, irrespective of utilitarian concerns, states that criminalize suicide are affirmatively saying that there is no right to die. It is entirely possible that a majority of people in the world today support this legislation.

But why do all these people think that suicide is wrong? Is it because suicide is a selfish act that harms one's relatives and friends? This is surely sometimes true but it is not necessarily true. Suicide can be an altruistic act. Some of Dr. Kevorkian's patients were not only in great pain, but their need for medical care was depleting their families of money that could be used for the grandchildren's education.

I think that most people think suicide is wrong because they regard it as an offense against God or Nature. They believe that we are not the owners of our own bodies but rather the custodians of our bodies. Our bodies are a gift from God, and we have no right to pervert our God-given freedom of will by choosing to destroy our bodies. I don't know if I have stated this reason in a form that most people would accept as fairly descriptive of their beliefs. Some may simply wish to assert that human life is sacred. If life is sacred, no one has a right to take it away.

If we view the matter in these terms, it is clear that the reasoning behind denying a "right to die" implicates at least two other major moral issues of our times. First is the debate over abortion. If people are only custodians over their bodies, and if all human life is sacred, then these arguments will help the "right to life" side of the abortion debate and hurt the "pro-choice" side. Second is the debate over capital

punishment. But what side is helped here. If human life is sacred, then the state's executioner should be barred from carrying out the death penalty. On the other hand, many people who believe strongly in the sacredness of life feel that one who takes the life of another should pay with his own life. Execution has a deterrent value; it may save more lives in the long run by its threat of the ultimate penalty. However, I would guess that the fact that many religious people believe in capital punishment is probably based on a perception that is less rational than deterrence theory. It may be based on the idea that an angry God insists on vengeance against murderers, and that the state executioner is doing God's work.

Because of the connection between the moral issues of suicide, abortion, and capital punishment, it is possible that as societies work out their positions on the latter two we may see a change in attitudes toward suicide. For myself, I have an ambivalent attitude toward Dr. Kevorkian. I'm not opposed to what he's doing—if I correctly understand the circumstances of his patients—but I am opposed to the idea of a doctor doing it. I think that doctors should not be involved in deliberately ending life, whether it might take the form of assisting suicides or acting as state executioner in injecting a lethal poison into the veins of a convicted murderer. Such actions are, I believe, in violation of the physicians' Hippocratic oath. We want all doctors to be committed at all times to saving life.

IX. TO LAW STUDENTS INTERESTED IN HUMAN RIGHTS

When I was an undergraduate, there was a one-liner making the rounds in the Philosophy Department. Question: "Why are you majoring in Philosophy?" Answer: "For the money."

Similarly, if a law student were asked a few years ago, "Why are you majoring in international human rights?" a quip response could have been, "For the money."

The funny thing is that the first answer—about Philosophy—is still a humorous one-liner, but the second answer—about international human rights—is becoming factual instead of funny.

Our world is changing so fast that now there is a good economic reason for a law student to emphasize the study of international human rights. Ever since President Carter said that human rights is the "soul" of American foreign policy, we have seen the subject come down from the academic clouds to be transformed into an instrument of intergovernmental relations. The military interventions of the Reagan-Bush years have all been justified in terms of protecting human rights—Grenada, Nicaragua, Panama, Kuwait. But even more economically significant for lawyers has been the proliferation of human-rights cases in courts around the world.

Even in my own part-time occupation as a practitioner, I have had occasion to argue a human rights case in the European Court of Human Rights (*Kamasinski v. Austria*), and several in federal courts (including *Frolova v. U.S.S.R.*, *Carmichael v. United Technologies*, and *Nelson v. Saudi Arabia*.) Prominent in the news today are cases involving issues in the aftermath of the Marcos' dictatorship and matters of restrictive immigration policy. American courts are beginning to open up to the consideration of human rights abuses in foreign countries. I have argued that so long as a human-rights abuser has property in the United States, courts should take jurisdiction *in rem* over that property to the extent of injuries suffered by the victims, even if both abuser and victim are foreigners and the abuse occurred in a foreign country.¹⁰

Even though some American lawyers take these human rights on a *pro bono* basis, more and more are not. Where egregious violations of human rights have been shown, courts have been awarding damages in the millions of dollars. Small wonder that even jaded Wall Street law firms are beginning to study up on international human rights. Some of these firms have traditionally done everything possible to protect foreign governments—their clients—from human-rights lawsuits in American courts. They have promoted the attitude that such lawsuits are frivolous. Now the word "frivolous" is undergoing reexamination in these law firms—not because the meaning of the word has changed, and not because

¹⁰See *infra*, Chapter 15.

they have become intellectually convinced that human rights is a respectable subject, but because of the size of the verdicts in some pioneering human rights cases. However, if you ask these firms why they are becoming interested in human rights, they will give you a barrage of high-minded rhetoric about the primacy of human rights in a shrinking world. It appears that the only answer you won't get from them is, "For the money."