

TRUE FREEDOM REQUIRES ECONOMIC JUSTICE:

Clarifying the Goals of “Transformative Justice”

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True Freedom Requires Economic Justice: Clarifying the Goals of “Transformative Justice”¹

By Frank M. Dunbaugh, *Juris Doctor*
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I. Introduction

Penal abolitionist, **Dr. Ruth Morris**, the founder of **ICOPA** (International Conference on Penal Abolition), began in the early 1990’s to propose a new paradigm which she called “**Transformative Justice**.” This is Dr. Morris’ great legacy, and it should continue to guide ICOPA’s focus. She clearly articulated why the existing system of punitive (or retributive) justice is a failure.³ She asked abolitionists to reject the popular alternative of “restorative justice”, saying that it does not reach the underlying problems that lead people to anti-social behavior.⁴ But, as noted in my 2000 article for ICOPA 9,⁵ Dr. Morris did not give us a clear picture of how transformative justice might be implemented. I characterized her proposed transformative justice as a goal, not a plan of action. That goal needs clarifying, but it would surely encompass a broad meaning of *freedom* and a political plan (not just law reform) for bringing about *economic justice* and its other objectives.

Because the American (USA) political system has generally rejected the idea that the U.S. Constitution supports a right to economic justice,⁶ this article explores some theories for incorporating into the U.S. legal system clearer individual rights to the essential attributes of modern life.

II. What is “Freedom”?

President George W. Bush and I have one thing (*and just one thing*) in common. We both like the word “FREEDOM”. My sail boat is named “Freedom”; my house is named “Freedom’s Landing”. I named my boat Freedom, because there are no roads on the sea, so travel is mostly unrestricted. A sailor on the open sea is free to go in any direction, except as limited by the currents and the winds.

¹ This paper was prepared for presentation to the **11th International Conference on Penal Abolition**, Hobart, Australia, February 7-11, 2006. It explores the legal bases for elements of the *transformative justice* that Ruth Morris envisioned as the peaceful alternative to current harsh punitive justice practices.

² Today would have been Dr. Martin Luther King’s 77th birthday. Mine will be next year.

³ Dr. King understood the need to abolish our retributive justice practices. He said, “Sooner or later, all the peoples of the world will have to discover a way to live together in peace, and thereby transform this pending cosmic elegy into a creative psalm of brotherhood. If this is to be achieved, man must evolve for all human conflict a method which rejects revenge, aggression, and retaliation. The foundation of such a method is love.” Address delivered in acceptance of the Nobel Peace Prize, Dec. 10, 1964, Oslo, Norway.

⁴ See, Morris, *A Practical Path to Transformative Justice* (1994) and *Why Transformative Justice* (1999).

⁵ Dunbaugh, *Picturing the Transformation Process*, an article presented to ICOPA 9 (Toronto, 2000). I took issue with Dr. Morris, because I believe that “restorative justice” is a useful alternative to the existing criminal law system, even though I agree with her concern that greater additional reforms are needed.

⁶ Every move to provide universal health care in the U.S. is countered with cries of “socialism”, as if that was inscribed as a sin on the tablet Moses is said to have brought down from Mt. Sinai. In the U.S., “economic rights” means the right to acquire, possess and use without restriction as much private property as possible, but does not include the right not to be fleeced nor the right not to be forced into and kept in poverty.

President Bush uses the word “Freedom” in an unspecific way to describe what he believes the United States of America has that makes citizenship in this country valuable.⁷ He boasts that we are spreading political “freedom” to other parts of the world.⁸ Are we?

Freedom is a concept that is very hard to define. According to my old dictionary,⁹ freedom is the “state of being free; exemption from slavery, servitude, confinement, or constraint; liberty; independence; frankness; openness; outspokenness; unrestrictedness.”¹⁰

These definitions are not much help. In his 1941 State of the Union address, President Franklin D. Roosevelt warned the nation of the dangers posed by the world’s dictators whose aggression had launched World War II,¹¹ and he expressed his hope for a post-war world “founded upon four essential human freedoms.” He included an element of economic justice in these four freedoms which were:

1. *Freedom of speech and expression* – everywhere in the world.
2. *Freedom of every person to worship God in his own way* – everywhere in the world.
3. *Freedom from want*, which . . . will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world.
4. *Freedom from fear*, which . . . means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world.

⁷ Douglas Dunn, in his *Bluebirds Are Free* (@ <http://www.wordwiz72.com/bbird.html>), has described the value of freedom very well. He developed a back yard relationship with a bluebird that sat on his hand to eat food that he offered. Dunn writes that he rejected the suggestion that he close his hand to capture the bird, because “no matter how delightful the feathered ‘trophy,’ it would have meant the loss of my real treasure -- that in her voluntary assent, I had ‘captured’ her heart and soul, not her body. As long as she remained free, she remained mine in a sense that no cage could ever hold her.” This taught him that, “The ultimate victory in relationships . . . was to create a condition so attractive that another sentient being comes to you and stays with you entirely by its own choice.”

⁸ Actually, it was President Carter whose foreign policy was marked by his commitment to human rights. In his inaugural speech (1/20/1977), Mr. Carter said: “Because we are free we can never be indifferent to the fate of freedom elsewhere. Our moral sense dictates a clear cut preference for those societies which share with us an abiding respect for individual human rights. We do not seek to intimidate, but it is clear that a world which others can dominate with impunity would be inhospitable to decency and a threat to the well-being of all people.” He continued: “I would hope that the nations of the world might say that we had built a lasting peace, built not on weapons of war but on international policies which reflect our own most precious values.” The full text is at <http://www.bartleby.com/124/pres60.html>.

⁹ The New Webster Encyclopedic Dictionary of the English Language, Consolidated Book Publishers (Chicago, 1952). According to my Thesaurus the words and phrases “independence”, “exemption from restraint”, “emancipation”, “liberation”, and “release” are synonyms for “freedom”. “See, LIBERTY” it says.

¹⁰ While, like President Bush, most Americans tend to regard “freedom” as a right secured to them by their Constitution, the U. S. Constitution lacks any broad guarantee of freedom. Specifically, as to the dictionary definitions, it only guarantees against slavery (and involuntary servitude), *except as a punishment for crime*, in the 13th Amendment and against *unlawful* detention in a few places, such as the 4th, 5th, and 14th Amendments.

¹¹ This address was delivered on Jan. 6, 1941, eleven months before the Japanese attack on Pearl Harbor. By this time, Germany, Italy and Japan had made a formal alliance (9/27/1940). Hitler’s armies had taken Poland, Denmark, Norway, Finland, Belgium, the Netherlands, and France. Italy had taken Ethiopia, Somalia, Libya, and Albania. Japan had taken Korea, Manchuria, much of China, and what is now Vietnam. Hungary, Bulgaria and Romania had joined the Axis alliance. England, Greece, and Egypt were under attack. Burma, Thailand, India, Malaysia, Singapore, the Dutch East Indies (Indonesia) and Australia were threatened by Japan.

This “four freedoms” outline became the framework for the Atlantic Charter¹² which, in turn, set the course for the creation of the United Nations Charter.¹³

President Roosevelt prefaced his pronouncement of the four freedoms by saying:

The basic things expected by our people of their political and economic systems are simple. They are: (1) Equality of opportunity for youth and for others, (2) Jobs for those who can work, (3) Security for those who need it, (4) The ending of special privilege for the few, (5) The preservation of civil liberties for all, and (6) The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living. These are the simple, the basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world. The inner and abiding strength of our economic and political systems is dependent upon the degree to which they fulfill these expectations. Many subjects connected with our social economy call for immediate improvement. As examples: We should bring more citizens under the coverage of old-age pensions and unemployment insurance. We should widen the opportunities for adequate medical care. We should plan a better system by which persons deserving or needing gainful employment may obtain it.¹⁴

Contrast this litany with what is happening in America and elsewhere today. Jobs are being outsourced from countries with decent working conditions, health insurance¹⁵ and long term security for workers to nations that tend to allow workers to be treated as slaves. Large American and international corporations are trying to rid themselves of having to provide health care for their workers and retirees and from the pension plans to which they had previously agreed. We seem to be moving away from Roosevelt’s goals.

After much deliberation considering the meaning of “freedom”, I have concluded and firmly believe that:

Freedom is having a realistic opportunity to exercise discretion.

¹² After the United States had begun the Lend Lease program (5/11/1941) to provide war materials to Great Britain but before the United States entered the war (12/8/1941), President Roosevelt and Prime Minister Churchill met on a ship off of Newfoundland on August 14, 1941, and agreed to the Atlantic Charter which set forth eight principles to guide the war effort and to set a vision for the post war world. They included the right to self determination, freedom from want, and freedom from fear. More specifically, as to economic justice, these wartime leaders expressed on behalf of their nations that: “they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security”. See the full text of the Atlantic Charter at <http://www.yale.edu/lawweb/avalon/wwii/atlantic.htm> .

¹³ Adopted at San Francisco on June 26, 1945. Article 1 sets forth the purposes of the United Nations. Art. 1, Sec. 2 provides for developing equal rights and self determination. Sec. 3 provides that a purpose of the UN is “solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” See also, Art. 55 & 62. The full text of the U.N. Charter is at <http://www.yale.edu/lawweb/avalon/un/unchart.htm> .

¹⁴ The full text of his address is at <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> .

¹⁵ I have always objected to the failure of many analysts to distinguish health insurance from health care. Health insurance brings into the health care business the insurance industry (who are essentially gamblers). If we plan to provide universal health care, that is medical care for everyone, we need only health care providers and accountants, not gamblers.

That is, to have freedom one must be able to exercise discretion. And this means having leisure time and extra resources (“disposable income” beyond that essential to exist) to make significant choices. As with Dunn’s bluebird, *range of choice* is the true measure of freedom. If one is fully occupied all of his or her waking hours working to earn just enough to feed and clothe and house one’s own family and dependents, then there is no discretionary time and there are no discretionary funds.¹⁶ Thus, there can be no discretion exercised and no freedom to make any real choices. Even for most of us who are out of poverty, but are not wealthy, our range of choices is severely limited.¹⁷ ***Freedom is a rich man’s luxury.***¹⁸ As Eleanor Roosevelt said, “**Freedom without bread . . . has little meaning.**”¹⁹

It can be said that everyone has a choice between having beans or steak for dinner, or between buying a worn out, used Chevrolet Malibu or a new Jaguar XKR convertible, or between renting the movie “Blue Hawaii” or taking a vacation on Tahiti. But the only people with a real choice (*i.e.* people with ***freedom***) are those who can afford to pay for a steak, a Jaguar, or a South Sea island vacation and who can take the time away from their work²⁰ or from family care giving (or from hunting and gathering) to actually travel to the South Pacific, or even to a near-by public park, or lake, or sea shore.

The lesson here is that freedom and economic independence are directly proportional. If our political goal is as President Bush claims, then we should be very concerned that a vast number of the world’s population, (including many American citizens) lack sufficient economic independence to participate meaningfully in the freedom our President so cherishes. Since economic independence is essential to freedom, why is there so little effort, if there is any, by the U.S. and by some other governments to promote a goal of ***economic justice*** for all?

III. What is Economic Justice?

In the year 2000, former President Jimmy Carter advised that the world’s greatest challenge in the new millennium was the growing chasm between the rich and the poor people on earth. “There is not only a great disparity between the two, but the gap is steadily

¹⁶ Douglas Dunn, in his article *Economic Justice & Fairness*, wrote: “Money spent in the economic system affects the broad-based economy differently depending on the level at which it is spent. People are equal; dollars are not. Primary layer dollars represent bare survival. Secondary layer represents more security at the survival level. Next is improved quality of survival goods and addition of minor luxuries. Moving far enough up the scale is a very high quality of survival goods, extensive luxuries and tremendous discretionary spending options, which can go for savings, investment, or other categories.” See, Broadening the Economic Base at <http://www.wordwiz72.com/econ.html> .

¹⁷ Our political choices are so restricted in America that it is a stretch to apply the word freedom to our electoral process. Alternative political parties and their candidates are routinely excluded from the official ballots, from many candidate debates, and from most media coverage.

¹⁸ Most people in this world have virtually no choices at all. This lack of freedom is best expressed by Nina Simone in her marvelous song, “**I wish I knew how it would feel to be free**” (written by Richard Lamb and William Taylor). Like Nina, few of us have much experience with true freedom, even in America.

¹⁹ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, New York, 2001) at page 43.

²⁰ The technological advances which were supposed to raise the standard of living for all of us only permit executives, but not manual laborers, to continue to do their work from the beaches of Tahiti, or even a local park.

widening.”²¹ In his recent book, Carter notes that while the average annual family income in the U.S. exceeds \$50,000, over half of the world’s population lives on less than \$2 per day. Access to clean water, which we take for granted, is non-existent in many communities throughout the world.²² The problem is this: Who will correct the economic disparity?²³ How can it be done? And who will correct the environmental deficiencies? How can they do so? And by what laws or incentives can we get them to do it?

During most of my adult life, my country (the USA) was engaged in an ideological struggle with the Soviet Union. It was presented to us as a struggle between freedom and totalitarianism and as a struggle between free-market capitalism and communism. The struggle was so fierce that we were always fearful of being labeled as traitors if we challenged what we were told. But anyone with any learning and understanding knew that the official view of the struggle was not true. We knew it, because we knew that America was not a true democracy and that many people here were not free in any real sense. And we knew it, because we also knew that our economy was not based on free enterprise. The government supported many business interests, and limited many others, with direct and indirect subsidies, with taxes and tax breaks, with control over interest rates and banking, with huge government contracts and with regulations. In other words, we did not need to know anything about what happened in the communist countries in order to know that the contrast presented to us was false.²⁴

A very significant side effect of this struggle, however, was that the people of the United States were effectively brainwashed to suspect any government controlled programs and to reject any proposal to provide services and economic assistance for the people. The opponents of such programs only needed to argue that it is “socialistic” for the government to deliver free services. Even in very recent times, efforts to provide universal health care have been brought down as a form of “socialized” medicine.

In the olden days, when the United States was thought to be ruled by the will of the people, it was well understood that a system of universal education was essential to promote the equality of opportunity necessary to level the playing field so that all citizens would be qualified to vote and to hold public office.²⁵ A system of publicly financed education was considered an integral part of our democracy. No one complained of socialism or of robbing the rich to help the poor. Our country had a tradition of community effort, such as barn-raising. It was sensible to tax everyone to pay for public education,

²¹ Carter, *Our Endangered Values* (New York, 2005), p. 179. John Perkins, in his book, *Confessions of an Economic Hit Man* (San Francisco, 2004) notes how fast the gap is widening and says that this condition is the natural outcome of strategies deliberately employed by the rich nations, powerful corporations and the international banks to grab and to exploit the resources of the underdeveloped nations and their people.

²² Paul O’Neal, President Bush’s first Treasury Secretary came up with an inexpensive plan for providing clean water to villages in Africa. It was rejected. See, Ron Suskind, *The Price of Loyalty* (New York, 2003), pp. 253-259, 266-267.

²³ In George Washington’s administration, Treasury Secretary Hamilton argued that the federal government should control the nation’s economy. He was opposed by Secretary of State Jefferson. The issue was not resolved then, and it has not ever been resolved.

²⁴ Much of George W. Bush’s current rhetoric about the Iraqi insurgents being opposed to democracy and freedom is straight out of the Cold War playbook.

²⁵ For too long this did not include African-Americans, or women.

because we all benefit from an educated and informed electorate. We considered basic education to be an essential of life that should not be denied to anyone.²⁶

If we were to assume for the moment that it is in the best interests of us all to ensure that everyone has the “essentials” of modern life, what would that include? The U.S. Catholic Bishops have said that “all people have a right to life, food, clothing, shelter, rest, medical care, education and employment.”²⁷ I might add a safe environment, consumer protection, mobility, communications, access to information, and civil and political rights, including legal aid.

When there is a consensus that these *are* essential elements of life and that it is inhumane to deny to some people one or more of these essentials, then it is clear that pooling our resources through taxation and providing those essentials through government funded programs makes sense. Thus, we must find a way politically to achieve this result. It clearly is not achieved effectively by our current national policy of low taxes and tax deductions for wealthy contributors to private charities.²⁸

The present human rights law of the United States lacks a sound foundation. As Professor Charles L. Black, Jr., points out: “[T]he ‘enumerated’ (or textually specified) rights found in the Constitution and in our Bill of Rights – the first eight amendments – are

²⁶ Unfortunately, however, we have not expanded this rationale to include health care, housing, nutrition, or other essentials of life. The U.S. Supreme Court has even held that there is no constitutional right to an education. See, discussion of *San Antonio Ind. Sch. Dist.v. Rodriguez* at pages 15-17, *infra*.

²⁷ In 1986, the U.S. Conference of Catholic Bishops issued a Pastoral Letter entitled “Economic Justice for All”. In this letter, the bishops described economic justice, as follows:

Human rights are the minimum conditions for life in community. In Catholic teaching, human rights include not only civil and political rights but also economic rights. As Pope John XXIII declared, "all people have a right to life, food, clothing, shelter, rest, medical care, education, and employment." This means that when people are without a chance to earn a living, and must go hungry and homeless, they are being denied basic rights. Society must ensure that these rights are protected. In this way, we will ensure that the minimum conditions of economic justice are met for all our sisters and brothers.

Later in the pastoral letter [at ¶80], the Bishops expand some on this concept by saying: “The full range of human rights has been systematically outlined by John XXIII in his encyclical Peace on Earth (Pacem in Terris). His discussion echoes the United Nations Universal Declaration of Human Rights and implies that internationally accepted human rights standards are strongly supported by Catholic teaching. These rights include the civil and political rights to freedom of speech, worship, and assembly. A number of human rights also concern human welfare and are of a specifically economic nature. First among these are the rights to life, food, clothing, shelter, rest, medical care, and basic education. These are indispensable to the protection of human dignity. In order to ensure these necessities, all persons have a right to earn a living, which for most people in our economy is through remunerative employment. All persons also have a right to security in the event of sickness, unemployment, and old age. Participation in the life of the community calls for the protection of this same right to employment, as well as the right to healthful working conditions, to wages, and other benefits sufficient to provide individuals and their families with a standard of living in keeping with human dignity, and to the possibility of property ownership. These fundamental personal rights -- civil and political as well as social and economic -- state the minimum conditions for social institutions that respect human dignity, social solidarity, and justice. They are all essential to human dignity and to the integral development of both individuals and society, and are thus moral issues. Any denial of these rights harms persons and wounds the human community. Their serious and sustained denial violates individuals and destroys solidarity among persons.”

²⁸ Even if it were working, this policy suffers from the lack of democracy. If we choose to provide shelter to all people, why should the wealthy (and not our elected representatives) decide how to implement this policy?

very plainly insufficient to found a system broad and comprehensive enough for a really free people to walk around in.”²⁹ Can we overcome the political obstacles of the Cold War by creating new constitutional rights or by developing recognition for existing enforceable rights that would implement our quest for economic justice?

IV. Theories for Making Economic Justice a Legal Imperative for the U.S.

There are two plausible (in my judgment), but perhaps not viable, theories by which we might inject a broad based foundation for human rights law into the U.S. Constitution.^{29a} The First Theory is based on Article VI of the U.S. Constitution which provides that all treaties made by the United States are the “supreme Law of the Land” to be treated equally with the Constitution itself and with the laws passed by the Congress. This, in conjunction with the United Nations Charter, the U.N. Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights, could serve as a basis for incorporating principles of economic justice into U.S. constitutional law provided that the American people can restore their confidence in the U.N. and their belief in the need for peace and human rights to be enforceable requirements of international law. The Second Theory is based on the concepts propounded by law professor Charles L. Black, Jr., in his book, *A New Birth of Freedom*, in which he notes that the Ninth Amendment reserves to the people basic rights which are not enumerated in the U.S. Constitution nor in the Bill of Rights and proposes that these rights be developed and articulated by the courts through the normal logical developmental processes of the common law.

The U.N. Human Rights Treaty Theory. This discussion is more relevant to ICOPA participants than the second theory, because it is likely to apply to the laws of most countries, whereas the Ninth Amendment theory is unique to the United States.³⁰ The gist of this theory is that Article VI of the U.S. Constitution (I expect that most national constitutions have such a provision) gives the treaties entered into by the United States the force of law equivalent to the Constitution itself or to an act of Congress.³¹

Any treaties signed and ratified by the United States are binding on all courts in this country.³² Thus, if there is a treaty that provides some measure of economic justice, in theory, it can be enforced in the U.S. Courts.³³ Let us look at the U.N. documents.

²⁹ Black, *A New Birth of Freedom* (Grosset/Putnam, Inc., New York, 1997) at p. 2.

^{29a} [Footnote added in 2008.] A third theory has been added as an Appendix at p. 18, *infra*.

³⁰ While it represents an interesting intellectual exercise, I apologize for taking up so much of the reader’s time with a discussion that does not apply to other nations.

³¹ The relevant part of Article VI provides: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

³² There is often a disparity between the law and practice. Many elected officials in America are not friendly to the United Nations. Our President took the nation into an armed conflict against Iraq without the approval of the U.N. Security Council. In a ballot restriction case presented by this author to the courts of Maryland, we argued, *inter alia*, that the state restrictions violated international human rights treaties. The Attorney General of Maryland ignored these arguments, as did the court, which ruled in our favor on other grounds.

³³ Unfortunately, American hostility to international law is often reflected in reservations to treaties to the effect that the treaty is not self-executing, so that it would take an Act of Congress to give the U.S. courts jurisdiction over enforcement. See, Buergenthal, *International Human Rights* (West Publishing, Third Ed., 2002) at 369.

1. The United Nations Charter³⁴ – The preamble of the Charter notes that its aims include (a) to reaffirm faith in “fundamental human rights”, in the “dignity and worth of the human person”, and in “equal rights”; (b) to promote “social progress” and “better standards of life” and “larger freedom”; and (c) to promote the “economic and social advancement” of all peoples.

The purposes of the United Nations, as set forth in Chapter I., Article 1, include: (a) equal rights, (b) self determination, (c) solving problems of an economic, social, cultural or humanitarian nature; (d) respect for human rights and fundamental freedoms; and (e) non-discrimination based on race, gender, language, or religion;

In Chapter IX, Articles 55 & 56, the Charter commits the United Nations and its Member States to promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems, and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, gender, language, or religion. Chapter X creates the Economic and Social Council as an arm of the General Assembly to oversee the implementation of the obligations set forth in Chapter IX.

2. The Universal Declaration of Human Rights -- This is an historic instrument, adopted as a resolution of the U.N. General Assembly.³⁵ It is historic, because it was the first comprehensive statement of human rights to be proclaimed by a global international organization. It has immense moral status, and even though it is not a treaty which has the force of law in the United States, its universal acceptance has given it important legal and political significance of the kind enjoyed by the Magna Carta, the French Declaration of the Rights of Man and the American Declaration of Independence.³⁶ The drafting of the Declaration of Human Rights was a monumental effort in which imaginative and powerful minds from a variety of cultures³⁷ collaborated under the determined and diplomatic guidance of Eleanor Roosevelt, and very significant contributions were made by a number of people with quite different backgrounds.³⁸

The Universal Declaration of Human Rights is a remarkable document, because it incorporates civil, political, cultural, social and economic rights. In fact, it is a virtual blueprint of the goals that ICOPA could use to implement Ruth Morris’ vision of transformative justice.³⁹

³⁴ Signed by the United States on June 26, 1945, ratified by the U.S. Senate on Oct. 24, 1945 (59 Stat. 1031).

³⁵ Adopted by Resolution (217 A III) of the General Assembly on December 10, 1948.

³⁶ Buergenthal, *International Human Rights*, West Publishing (Third Ed. 2002) at p. 35.

³⁷ The Commission on Human Rights that drafted the Declaration included the following: Eleanor Roosevelt (U.S.) chair, P.C. Chang (China) vice chair, Charles Malik (Lebanon) secretary, René Cassin (France), Valentin Tepliakov (USSR), Charles Dukes (U.K.), Carlos Romulo (Philippines), Hansa Mehta (India), William Roy Hodgson (Australia), Vladislav Ribnikar (Yugoslavia), and Hernán Santa Cruz (Chile).

³⁸ Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, New York, 2001).

³⁹ Because the Declaration is so comprehensive, and has world-wide acceptance, including in the countries of the ICOPA delegates, I suggest that **ICOPA 11 adopt the attached Resolution** to promote human rights law as a way of implementing Transformative Justice.

With respect to the economic justice under discussion in this paper, the most relevant provisions included in the Universal Declaration of Human Rights are:

Art. 22. Everyone, as a member of society, has the right to social security and is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Art. 23. (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for protection of his interests.

Art. 24. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Art. 25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Art. 26. (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental states. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (3) Parents shall have a prior right to choose the kind of education that shall be given to their children.

The Commission on Human Rights which drafted the Declaration made some very significant policy decisions which helped to ensure its acceptance. They decided to leave implementation and enforcement out of the Declaration, so that the Member States only had to agree to the articulation of principles. They left the implementation to separate covenants which would have the status of treaties. Instead of just one covenant, it was decided to have two. One covenant was for civil and political rights and another covenant was for economic, social and cultural rights. This allowed for a treaty that put the more traditional civil and political rights into effect immediately,⁴⁰ while another treaty with the less traditional, more controversial and more resource-demanding economic, social and cultural rights could be framed with a more gradual pace of implementation.

3. The U.N. Covenant on Economic, Social, and Cultural Rights⁴¹ -- This is the treaty most relevant to our discussion of economic justice. The shame is that the United States has not ratified this treaty, so it has no force here and can not serve to define U.S. human rights law. The Preamble to this treaty articulates quite well the relationship between freedom and economic justice. It says that:

⁴⁰ The U.N. Covenant on Civil and Political Rights was ratified by the U.S. Senate on September 8, 1992. Two optional protocols have been adopted, but not ratified by the United States.

⁴¹ Signed by the U.S. on October 5, 1977, apparently with no reservations, but never ratified by the U.S. Senate.

“The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:”⁴²

According to Buergenthal this “Covenant contains a longer and much more comprehensive catalog of economic, social and cultural rights than the Universal Declaration.”⁴³ He notes that the Covenant recognizes the right to work; the right to the enjoyment of just and favorable conditions of work; the right to form and join trade unions; the right to social security, including social insurance; the right to the protection of the family; the right to an adequate standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; the right of everyone to education; and the right to take part in cultural life. Further, the Covenant does not merely list those rights, it describes and defines them in considerable detail and frequently sets out the steps that should be taken to achieve their realization. Buergenthal points out that Article 7 is typical when it calls for “remuneration which provides all workers” (a) with fair wages, including equal pay and equal conditions for equal work (in particular for women), and (b) with a decent living for the workers and for their families. It also calls for “safe and healthy working conditions, and for an “equal opportunity for everyone to be promoted . . . to an appropriate higher level job, subject to no other conditions than those of seniority and competence.” Art. 7 also calls for “rest, leisure and reasonable limitation of working hours and periodic holidays with pay,” as well as pay for public holidays.

This Covenant would be a good source for economic justice rights, except that the U.S. Senate refused to ratify the covenant. Since the Declaration of Human Rights is not a treaty, there is not much left to rely on as a basis for promoting economic justice in the U.S.⁴⁴ [But see, the “2008 Addendum” at page 18, *infra*.]

⁴² Note the reference to Franklin Roosevelt’s “Freedom from Fear” and “Freedom from Want”.

⁴³ Buergenthal, at p. 64.

⁴⁴ There have been a series of other human rights treaties dealing with discrimination, torture, rights of prisoners, etc., but I do not know of any treaty by which the U.S. has committed itself to enforce economic justice.

Professor Black’s Ninth Amendment Theory. Professor Black argues that the Ninth Amendment to the U.S. Constitution⁴⁵ incorporates into the Constitution, as attributes or privileges of national citizenship, some rights that were not mentioned specifically in the Constitution, but which were suggested or implied by the Declaration of Independence, and that these rights also became attributes of state citizenship by virtue of the adoption of the Fourteenth Amendment.⁴⁶

The United States of America came into being as an undefined polity on July 4, 1776, when a group of delegates purporting to represent the 13 English colonies of North America⁴⁷ adopted and signed the Declaration of Independence. This was more than 12 years before September 17, 1787, when a Constitutional Convention produced a proposed constitutional document for ratification by the states. Accordingly, it can be argued that the true founding document of our country is the Declaration of Independence.⁴⁸

The Declaration of Independence recites broad claims of rights that the framers believed to be “natural” or inherent human rights, rights that every person possesses (“endowed by their Creator”) that could not be taken away (“unalienable Rights”) from anyone by any government -- the King, the Parliament, or even the new independent American authorities.⁴⁹ These are spelled out in the Declaration’s second paragraph which says:

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, lay its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.⁵⁰

Thus, the Declaration lists the right to life, the right to liberty, the right to *pursue* happiness (not the right to *be* happy), the right to change or to overthrow the government, and certain other unspecified inalienable rights as being natural human rights. It also declares that all persons are equal and that a government can only derive its powers justly from the consent of those who are governed. Further, it declares that the purposes of

⁴⁵ The Ninth Amendment provides: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

⁴⁶ Section 1 of the Fourteenth Amendment provides in the parts relevant to Professor Black’s thesis: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”

⁴⁷ We have a bad habit of ignoring that there were English colonies in Canada at the time.

⁴⁸ See, for example, Justice Scalia’s dissenting opinion in *Lee v. Weisman*, 505 U.S. 577 (1992) at 641.

⁴⁹ Jefferson himself noted late in his life that “Nothing, then, is unchangeable but the inherent and unalienable rights of man.” Letter to John Cartwright (1824), quoted in Boykin, *Wisdom of Thomas Jefferson* at page 59.

⁵⁰ The paragraph then re-articulates the right of the people to throw off a despotic government, states that it is now necessary for the colonies to do so, and leads into the specifications of grievances against the English Crown.

government are to protect these rights [or at least not to be destructive of them] and to affect the safety and happiness of the people it governs. Anyone familiar with America and its history knows that these principles have never been fully implemented.

Two serious defects can be found in U.S. law. First, the courts have not been willing to consider the Declaration of Independence as having much legal force as a source of rights. Second, the subsequently adopted Constitution, which set the foundations of our government, ignored the *equality* and the *legitimacy* principles of the Declaration by allowing the States to deny citizenship and equal political participation to African-Americans, both slave and free, and to women. What happened to the consent of the governed as a requirement of legitimate authority?

Professor Black articulates his theory, which I believe is sound, as follows:⁵¹

1. “The 1776 Declaration of Independence commits all the governments in our country to ‘securing’ for its people certain human rights, ‘among which are life, liberty, and the pursuit of happiness.’ These are certified cardinal values of our political morality. . . .”
2. “The 1791 Ninth Amendment to the Constitution . . . unmistakably rejects the idea that a human right, to be valid in law, must be enumerated (or explicitly named). The Amendment does not say which rights are the ‘others retained by the people,’ and are therefore not to be disparaged or denied But the Declaration of Independence, uttered a mere 13 years earlier, supplies this lack in major part: There is no apter reference than the Declaration for clearing up the words ‘retained by the people’”⁵²
3. “The ‘citizenship’ and the ‘privileges and immunities’ clauses of Section 1 of the Fourteenth Amendment [ratified in 1868] form a complex whole.”⁵³

“Citizens of the nation are, by national constitutional command, also citizens of those states, respectively, wherein they reside. Since state citizenship is a nationally commanded status, the substantive incidents of such citizenship are to be governed by national law. *To be a citizen of the State wherein you reside is a privilege annexed to and flowing from national citizenship.*”

“These two paths of thought lead to exactly the same result – the enjoyment, by citizens of each State (as well as by citizens of the nation, who are mostly the same people), of national rights founded on the Declaration of Independence and on the Ninth Amendment (see point 2, above).”

The national privileges and immunities of citizens of the United States are similarly derived and defined, and the States are forbidden to ‘abridge’ them.”

Since Professor Black identifies the rights to life, liberty and the pursuit of happiness as “certified cardinal values of our political morality,” it might be well to expand

⁵¹ The following three points (in six paragraphs) are quoted from Black’s book at page 38.

⁵² Since the rights referred to therein are *inherent* and *unalienable*, they must, therefore, still exist with and still be retained by the people.

⁵³ Professor Black, recognizing that the Supreme Court gutted the “privileges and immunities” clause in the *Slaughterhouse Cases* in 1873, devotes much of his book to explaining how the Court got it wrong.

on these nebulous, inherent rights in an attempt to give them some substantive content. Of course it is not possible to ascertain exactly what Jefferson had in mind in 1776 when he wrote these words, nor is it possible to know what the other 54 signers of the Declaration of Independence thought the words meant.⁵⁴ It is unlikely that there was any consensus among them.⁵⁵ But in less than a dozen years after writing the Declaration, Jefferson opined that good health and an active mind are keys to the pursuit of happiness. He said:

“Health, learning and virtue will insure your happiness”⁵⁶

“Without health there is no happiness.”⁵⁷

“A mind employed is always happy. This is the true secret, the grand recipe for felicity.”⁵⁸

Jefferson is not alone among the world’s most thoughtful political leaders to believe that there should be a human right to health. President Nelson Mandela of South Africa filled in more details and gave an expanded view of what constitutes health care:⁵⁹

[I]t is a great joy to be able to state that the South African government has made universal access to primary health care a priority. We all share in the pride of knowing that amongst the very first actions of the democratic government was the initiation of two successful programmes in the field of health. Over four million school children are being fed each day and there is free health care for pregnant mothers and young children.

Access to clean water, adequate food, housing, employment and sanitation play a decisive role in determining the health status of a population, and this government is committed to providing these over time. While effective changes in health service provision will improve access to health care, long-term improvements in the health of our people hinge on tangible improvements in living conditions.

The final arbiter of what human rights are protected by the U. S. Constitution is the Supreme Court of the United States. That Court has done fairly well over the years in protecting the rights of persons subjected to police searches, arrests and prosecution. It has also done a great deal to end officially sanctioned apartheid in America. But when it comes to recognizing that people have a right to the fundamental essentials of life, the Court has

⁵⁴ The inherent rights set forth in the Declaration came largely from John Locke’s second essay *Concerning Civil Government*, written about a century earlier. But the American founders changed man’s natural rights from Locke’s “life, liberty and estate” [¶87] to Jefferson’s “life, liberty and the pursuit of happiness.” Locke had written to justify deposing King James II and to reject the Divine Right of Kings to create hereditary titles that bestowed lieges (lords) with political power. He wanted to replace the titled aristocracy with a propertied aristocracy, empowering the merchant and professional classes. The Americans sought to be more egalitarian, but our Constitution did not implement *universal* natural rights.

⁵⁵ Commenting on the proceedings leading up to the Declaration, Jefferson said, “it would be vain to wait either weeks or months for perfect unanimity, since it was impossible that all men should ever become of one sentiment on any question.” See, the text of Jefferson’s autobiography and click “Declaration” at: <http://libertyonline.hypermall.com/Jefferson/Autobiography.html>.

⁵⁶ Letter to Peter Carr (1788), quoted in Boykin, *the Wisdom of Thomas Jefferson*, at p. 134.

⁵⁷ Letter to T.M. Randolph, Jr. (1787). *Id.* at 135.

⁵⁸ Letter to his wife Martha Jefferson (1787). *Id.* at 134.

⁵⁹ Speech delivered in Cape Town on March 6, 1995, reported in *Nelson Mandela in his own words*, edited by Kader Asmal, David Chidester & Wilmot James, published by Brown, Little & Co. (New York, 2003).

ignored all but the explicitly articulated rights spelled out in the Constitution. It has not adopted Professor Black's expansive view of the Ninth Amendment.

There have been two Supreme Court opinions in which individual Justices seem to have used the Ninth Amendment to find implied rights that have constitutional protection. *Griswold v. Connecticut*, 381 U.S. 479 (1965) involved the prosecution and conviction of family planning professionals who had counseled a married couple concerning the use of contraceptives. They challenged the Connecticut statute that made it a crime to use contraceptives, and the U.S. Supreme Court invalidated the statute. Writing for the majority, Justice Douglas found that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and that "Various guarantees create zones of privacy." [Citation omitted.] Thus, he concluded that:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." [Citations omitted.]

While Justice Douglas did not rely on the Ninth Amendment as the *source* of the implied right of privacy,⁶⁰ he did note that the Ninth Amendment explicitly provides that the enumerated rights can not be construed to deny the existence of other implied rights. In a concurring opinion in *Griswold*, Justice Goldberg seems to adopt the Ninth Amendment theory espoused by Professor Black. He says:

"I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. . . . I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, ante, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding." [Footnote and citations omitted.]

Justice Goldberg then pointed out that the Constitution "protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." He then quotes from *Meyer v. Nebraska*, 262 U.S. 390, 399 in which the Court said:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also [for example,] the right . . . to marry, establish a home and bring up children"

⁶⁰ The right of privacy found to exist in *Griswold* is at the heart of America's most fierce current political controversy, because it was the acceptance of this right that the Court relied on, in part, to strike down the Texas statute authorizing criminal prosecutions for abortion in *Roe v. Wade*, 410 U.S. 113, 152 (1973).

Justice Douglas took another occasion to bring up the Ninth Amendment. This time writing a dissenting opinion in *Palmer v. Thompson*, 403 U.S. 217 (1971), in which the Court overruled a lower court which had enjoined the City of Jackson, Mississippi, from closing its public pools to avoid desegregating them. The majority found no constitutionally protected right to have a swimming pool. Justice Douglas opined:⁶¹

My conclusion is that the Ninth Amendment has a bearing on the present problem. It provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary to our way of life that they have been labeled as basic rights. Such is the right to travel from State to State. *United States v. Guest*, 383 U.S. 745, 758. Such is also the right to marry. *Loving v. Virginia*, 388 U.S. 1, 12. The "rights" retained by the people within the meaning of the Ninth Amendment may be related to those "rights" which are enumerated in the Constitution. Thus the Fourth Amendment speaks of the "right of the people to be secure in their persons, houses, papers, and effects" and protects it by well-known procedural devices. But we have held that that enumerated "right" also has other facets commonly summarized in the concept of privacy. *Griswold v. Connecticut*, 381 U.S. 479.

There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment. May the people vote them down as well as up?

A State may not, of course, interfere with interstate commerce; and to the extent that public services are rendered by interstate agencies the State by reason of the Supremacy Clause is powerless to escape. The right to vote is a civil right guaranteed by the Constitution as we recently re-emphasized in *Oregon v. Mitchell*, 400 U.S. 112. . . .

Later in his opinion, Douglas pointed out:

We stated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638, that: "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." And we added in *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736-737, "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." Thus the right of privacy, which we honored in *Griswold*, may not be overturned by a majority vote at the polls, short of a constitutional amendment.

But generally speaking, the Court has not used the Ninth Amendment as a basis for finding new, unenumerated rights, and has always been reluctant to expand the rights American's enjoy. The case of *Palmer v. Thompson* is a good example.

Another striking example of this reluctance is the case of *San Antonio Independent School District v. Rodriguez*. 411 U.S. 1 (1973). This was a challenge to the system of funding local schools with taxes on real property. Parents and children from a school district located in a poor area sued, because it did not have the resources made available to school districts in affluent neighborhoods. The case was based on alleged deprivation of equal protection of the laws which discrimination adversely affected the educational opportunities of the children in the poor community. A lower federal court agreed, but the Supreme Court

⁶¹ 403 U.S. at 233-235.

reversed on two grounds: (1) that legislation that adversely affects poor people is not unlawful, because poor people are not a suspect class which is entitled to more stringent protection,⁶² and (2) that state laws that discriminate in educational opportunities do not require a showing of a compelling state interest, because education is not a “fundamental” right protected by the U.S. Constitution. As to this second point, the Court said:⁶³

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be pursued by and implemented by judicial intrusion into otherwise legitimate state activities.

. . . .⁶⁴

⁶² Soon after this case reached the high court, this author had occasion to brief top Nixon administration officials in the Cabinet Room of the White House concerning the Department of Justice's plans and strategy for desegregating southern school districts. Near the end, I suggested that to effectuate significant equal educational opportunities we should consider filing a brief in support of the plaintiffs in the *Rodriguez* case. Attorney General John Mitchell cut me off promptly, saying that discrimination based on wealth is not covered by the equal protection clause. The Court adopted this view.

⁶³ 411 U.S. at 35-38. [Footnotes omitted.]

⁶⁴ The deleted paragraphs are:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. See *Skinner v. Oklahoma*, supra, at 536; *Shapiro v. Thompson*, supra, at 634; *Dunn v. Blumstein*, supra, at 338-343.

It would take considerable campaigning in the academic world to build a body of legal writing and a rigorous litigation program to get the courts to begin to implement Professor Black's thesis. It might be worth the effort for the civil rights bar to undertake this program, but I have not noticed much movement in this direction so far.

V. Conclusion

The prospects for incorporating a significant element of economic justice into the American legal system do not look good. To advance either of the two theories discussed, would require extensive changes in the political outlook of many Americans. Ever since the Roosevelt era's "New Deal" reforms, there has been a concerted effort to make the American public fearful of government programs, labeling all kinds of programs designed to improve the welfare of the poor as "socialist", and thus leading to communism.

In addition, there has been staunch opposition to the United Nations from the outset based on a perceived fear that "foreigners", including "communists" would be able to govern America if we surrendered the least amount of sovereignty to any international authority. As we have passed into an era when our current political leaders did not experience the Second World War, there is less and less commitment to the idea fostered by that war that ALL wars are unacceptable and that they can only be avoided by having an effective international forum within which to resolve international conflicts politically, rather than by force.

In America, unilateralism is augmented by the reality that the U.S. is now the only nation on earth that can dominate the world by force. Our failure to provide every child with a classic education makes it worse. To the extent that the people can influence government policy (and the influence of the people is steadily diminishing), few Americans have learned

absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where - as is true in the present case - no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of *Dandridge v. Williams*, supra, and *Lindsey v. Normet*, supra.

the lessons of history. Most have no idea of what happened to the Roman Empire. Nor do they understand the lasting effects of the Crusades. They do not even know why the American colonies declared their independence from the British Crown and Empire. As already noted, not many American leaders are left who remember World War II. Correcting this deficiency would be no easy task, and it may be a necessary prerequisite to creating a political climate in which the United States will ratify, without reservation, the Human Rights treaties and adopt a broader view that will foster economic justice and real freedom.

I am disappointed that this paper was not able to chart a clear path for humanists to get the American legal system to respect the economic rights being developed over much of the world.^{64a} Nonetheless, we must keep the faith and continue to urge a movement toward Ruth's dream of Transformative Justice. The Universal Declaration of Human Rights was a hopeful document when it was adopted by the U.N. General Assembly on December 10, 1948. It is still a hopeful document today. I strongly urge that ICOPA 11 take an important step in the direction of restoring that hope.

Accordingly, I propose that the attached Resolution be offered to and adopted by the delegates at ICOPA 11 in Hobart, Tasmania, Australia.^{64b}

64a [Footnote added in 2008.] See, the **Addendum** below for a more viable third alternative.

64b [Footnote added in 2008.] The organizers of ICOPA 11 apparently never put this Resolution before the delegates.

NOTE: Frank M. Dunbaugh is the Executive Director of the *Maryland Justice Policy Institute*. He is a mostly retired human rights attorney who served twenty years (1958-1978) in the U.S. Department of Justice's Civil Rights Division, as a trial attorney, as a supervisor of a litigation section, and as a Deputy Assistant Attorney General who helped to establish and to implement civil rights enforcement strategies and policies. He helped to establish the litigation section which deals with the rights of institutionalized persons.

Since leaving the government in 1979, Mr. Dunbaugh has been an activist for law reform. As an attorney, he has represented prisoners with respect to their conditions of confinement and the Maryland Green Party in cases involving restrictions to ballot access. He is an abolitionist, who has attended seven ICOPAs. His abolitionist papers include *Premise for a Sensible Sentencing Debate: Giving Up Imprisonment*, with M. Kay Harris, 7 Hofstra Law Rev. 417 (1979); *A Vision of Prison Abolition* (1983); *A Strategy for Abolishing Prisons in the U.S.* (1985); *Where Should the Movement Move?* (1991); *Porqué Soy Abolicionista* (1996); and *Picturing the Transformation Process* (2000).

2008 Addendum

While we were preparing to make a presentation for the 60th Anniversary of the U.N. General Assembly's adoption of the Universal Declaration of Human Rights, my friend and co-counsel Mark Miller suggested a third alternative theory for bringing economic rights into U.S. law. Based on the holding of the United States Court of Appeals for the Second Circuit in the case of *Filartiga v. Peña*, 630 F.2d 876 (1980), it could be argued that rights set forth in the Universal Declaration and generally accepted and implemented in most of the world have become part of international law and thus are enforceable as part of U.S. common law.

Resolution

We, the delegates to the Eleventh **I**nternational **C**onference **O**n **P**enal **A**bolition, hereby resolve and commit ourselves to promote the concept of Transformative Justice.

Believing that the implementation of the rights described in the **U**niversal **D**eclaration of **H**uman **R**ights, is essential to achieving Transformative Justice, we support all of these rights, except insofar as any of them may conflict with ICOPA's principle that the penal law should be abolished, or imply that a punitive law system would be acceptable if reformed or if certain rights were respected.

We urge all nations, and each of us we will express our views to the people and government of our own nation, to fully implement and secure for all persons the rights set forth in the Universal Declaration of Human Rights, especially as those rights have been clarified and implemented by the Covenant on Civil and Political Rights, by its two optional protocols, and by the Covenant on Economic, Social and Cultural Rights.

For purposes of clarity, and to remind the delegates of its content, the Universal Declaration of Human Rights is attached to this resolution.

Universal Declaration of Human Rights

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights the full text of which appears in the following pages. Following this historic act the Assembly called upon all Member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories." *Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948*

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in

community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

Article 21.

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical

care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.