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A DECENT RESPECT TO THE OPINIONS OF MANKIND*

BY LOUIS HENKIN**

INTRODUCTION

I am impressed that the conveners of a celebration of the Bill of Rights have chosen as their theme "A Decent Respect to the Opinions of Mankind." At the birth of our nation, you will recall, the authors of the Declaration of Independence thought that it was important and necessary to accord decent respect to the opinions of mankind, and that such respect required the leaders of the Revolution to justify their decision to assert the right of "self-determination" (today's term) and to found a new nation. The conveners of this conference have apparently concluded that, even as we celebrate, it is important and necessary that we accord decent respect to the opinions of mankind about our Bill of Rights, and attend to mankind's criticisms of it.

One might have expected something more self-congratulatory. After all, the Bill of Rights is eminently worthy of celebration. It is our pride and glory. It was the first written, national bill of rights.¹ It is a keystone of United States constitutionalism, the first effective, successful, lasting realization of the idea of rights. It has been an inspiration and a model for others from the beginning,² and continues to be a model and inspiration in our day, the age of constitutionalism. The ideas it reflected and the example it provided have contributed to the international human rights movement which has established human rights as the idea of our time.

* This is the keynote address delivered at The John Marshall Law School on November 1, 1991 at its conference in celebration of the Bicentennial of the Bill of Rights. I have edited and annotated it lightly for publication. I have addressed some of the themes in this paper in earlier writings, most of which are collected in LOUIS HENKIN, *THE AGE OF RIGHTS* (Columbia Univ. Press 1990).

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1. The English Bill of Rights, a product of the Glorious Revolution of 1688, included a provision against cruel and unusual punishment, but otherwise was essentially a bill of Parliamentary rights rather than of individual civil and political rights.

2. The French Declaration of the Rights of Man and of the Citizen was adopted in 1789 but it drew on the Virginia Bill of Rights from which the U.S. Bill of Rights and other American instruments also borrowed. See Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1024-28 (1989).

The conveners of this conference, however, apparently recognized that self-congratulation is not the only, or the most enlightened, or the most fruitful, form of celebration. That, indeed, is my key note. I have adopted the theme of the conference as my title. I shall suggest that we indeed have much to celebrate, but that decent respect requires us to recognize that, in the opinion of mankind, our Bill of Rights, even as it has developed over 200 years, is not a complete, perfect human rights instrument and is deficient in important respects; that in thinking about rights we have not always been sufficiently attentive to the judgments and values of others; that others, having learned from us, may have bettered our instruction, broadening the vision and enlarging the conception of rights; that we have not always cooperated with the rest of mankind in the cause of rights; that we have not been as respectful of rights elsewhere as we have of rights here, of the rights of others as of our own.

I. OUR BILL OF RIGHTS TODAY

As commonly used, the Bill of Rights refers to the first ten amendments to the United States Constitution. The Bill of Rights we celebrate today is much more. Surely it includes later constitutional amendments extending individual rights or providing them additional protection — the 13th and 14th Amendments, and later amendments forbidding discrimination in voting on various invidious grounds. Indeed, we celebrate 200 years of constitutional history and 500 volumes of Supreme Court interpretation and development of those guarantees of rights.

The Bill of Rights today, then, is not what it was in 1791 when adopted to satisfy those who had made the addition of such a bill a condition of ratification of the Constitution. Our Bill of Rights is more celebrated today, and more worthy of celebration today, than it was at birth. For it was born with glaring "genetic defects,"³ not only by today's standards, but even by those of the Framers' generation. For the authors of the Declaration of Independence, "That all men are created equal"⁴ and are endowed with an inalienable right to liberty, were self-evident truths; the Constitution and the Bill of Rights made no reference to equality⁵ and did not guarantee the basic liberty, freedom from slavery. The Declaration of Independence had declared that governments "derive their just Powers

3. See Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. (forthcoming 1992).

4. Jefferson, I believe, used "men" to mean all human beings, not males only.

5. The word "equal" is in the Constitution only in the reference to the equal suffrage of states in the Senate. U.S. CONST. art. V.

from the Consent of the governed"; the Constitution, even with the Bill of Rights appended, reflected little commitment to representative government and less to democracy. Only one house of the new Congress was to be representative of the people, a house of representatives; the Senate represented states, not people, and the President represented no one at all. Even the House of Representatives did not effectively reflect the consent of all the governed. One could vote only if he (not she) had the right to vote for the most numerous branch of the legislature of the State in which he resided,⁶ and most people did not have that right. Also, the Bill of Rights did not include the Declaration's commitment to inherent liberty, to individual autonomy.⁷ It did not give constitutional protection to many fundamental civil and personal rights, such as the right to reside where one wants, to choose one's work, to marry a person of one's choice — rights left to the protection of the common law or to the state constitutions. The Constitution protected few rights against violation by the States, and the Bill of Rights afforded no such protection at all.⁸

During 200 years, we have filled many of those lacunae and remedied many of those deficiencies. We have done so in long-delayed, discrete, uncoordinated jumps. It required 80 years (and a Civil War) to abolish slavery. It took nearly 90 years to declare some commitment to equality and to provide important federal protection against state violations of individual rights. Some 100 years elapsed before the Constitution was interpreted as recognizing individual autonomy and protecting it against arbitrary laws. Not until some 180 years after the adoption of the Bill of Rights did we find in the Constitution a commitment to universal suffrage.

Some of the original defects were eliminated by formal amendment, some by "creative" constitutional construction. By amendment we abolished slavery,⁹ established rights to citizenship,¹⁰ gave federal protection against state deprivation of life, liberty or property without due process of law,¹¹ and against state denials of the

6. U.S. CONST. art. 1, § 2.

7. By the Declaration of Independence all are "endowed by their Creator with certain unalienable rights, among them Life, Liberty and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). We give up some of our autonomy to government only for the purpose of securing those rights.

8. Under the original Constitution "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST. art. 1, § 10. The Bill of Rights did not apply to the States. *See Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

9. *See* U.S. CONST. amend. XIII, § 1.

10. *See* U.S. CONST. amend. XIV, § 1.

11. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty or property, without due process of law").

equal protection of the laws.¹² We enhanced democracy by forbidding discrimination in voting on account of race, sex, age.¹³ We made government more representative by providing for the direct election of Senators.¹⁴ We also amended the Constitution to permit progressive taxation,¹⁵ making possible a more equitable distribution of the costs of government and large expenditures to support social services and otherwise provide for the general welfare.

In addition, we repaired lacunae and corrected deficiencies in the Constitution without formal amendment, by interpretation and by imaginative constitutional construction.¹⁶ The courts have enriched our First Amendment freedoms of religion, speech, press and assembly, and created a right of association. They have constitutionalized the theory of the Declaration of Independence, confirming the United States as a "liberal state," and have declared that the Constitution protects not only freedom from incarceration but individual liberty and autonomy generally. It protects that large liberty, as well as life and property, not only against deprivation without fair judicial procedures, but also against arbitrary laws; in effect, the courts held, the government has to justify every regulation, every interference with individual autonomy.¹⁷ The courts have also given special recognition and extraordinary protection to individual autonomy in intimate matters — in marriage, family, the education of one's children, and whether to have a child or an abortion.¹⁸ Recently — less than 30 years ago — the Supreme Court read the equal protection of the laws to require "one person, one (equal) vote," thereby effectively mandating universal suffrage.¹⁹ By constitutional construction, the courts also "homogenized" state and federal rights under the United States Constitution, giving federal protection to essentially the same rights against violation by either the state or the federal government.²⁰

12. *Id.*

13. See U.S. CONST. amend. XXVI, § 1; U.S. CONST. amend. XIX, § 1; U.S. CONST. amend. XV, § 1. See also U.S. CONST. amend. XXIV.

14. See U.S. CONST. amend. XVII.

15. See U.S. CONST. amend. XVI.

16. See generally LOUIS HENKIN, *Constitutional Rights — Two Hundred Years Later*, in *THE AGE OF RIGHTS* 109 (Columbia Univ. Press 1990).

17. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1983); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1899).

18. See, e.g., *Zablocki v. Redhail*, 43 U.S. 374 (1978) (right to marry); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry the person of one's choice); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (education of children).

19. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

20. Almost all of the provisions of the Bill of Rights have been held applicable to the states as well as the federal government. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). All the protections for rights against violation

The Bill of Rights remains a less-than-complete catalogue of rights. To date, it has not fulfilled even the promises of our own 18th century Declaration of Independence. The Declaration of Independence declared that governments are created to secure rights; the Constitution requires only that government itself respect rights. It protects only against "state action";²¹ the Constitution imposes no obligation on government to secure my rights against invasion by my neighbor. For such protections I can turn only to the tort and criminal laws and to the political process. Even as to violations by government officials, the Constitution does not protect all the rights "retained by the people"²² when they contracted to form their "more perfect union." Even for rights that enjoy protection, the Constitution does not provide a complete remedy. The courts have assumed authority to enjoin future violations but often they cannot provide effective remedies for the past, nor can they compel Congress to establish means to prevent violations, or to compensate victims of violations.

II. HAS MANKIND BETTERED OUR INSTRUCTION?

I turn to mankind and rights. Mankind came to rights late. The United States committed itself to the path of rights and constitutionalism from its national beginnings, but for a long time we trod that path almost alone. Elsewhere the idea of rights did not flourish. The United States ideology was adopted, the United States example was followed, in some new countries but not in many others; it appealed to some revolutionaries, but our way was too revolutionary for most. Even where a culture of rights was planted, often it did not flourish.²³ Then, in this century, after the Second World War, the idea of human rights swept the world.

The world has paid our Bill of Rights its greatest compliment, the flattery of imitation. Mankind's commitment to rights is not everywhere sincere or secure, but it has been made a necessary first step. The Universal Declaration of Human Rights,²⁴ now embraced by virtually all nation-states, adopted the idea of rights, almost all the provisions of the United States Bill of Rights, and many of its

by the states have been held applicable to the federal government, notably that the federal government may not deny any person the equal protection of the laws, found to be implicit in the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

21. See *Civil Rights Cases*, 109 U.S. 3 (1883).

22. See U.S. CONST. amend. IX. To date the courts have found no protection for any rights under this amendment.

23. After the French Revolution was swallowed by reign of terror, the French Declaration had no constitutional status until 1946. See *supra* note 2.

24. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

later developments in United States jurisprudence. International covenants and conventions open to all states, and regional agreements in Europe, America, and Africa, also reflect the influence of our constitutional culture.²⁵ Directly or through the Universal Declaration, numerous new constitutions looked to and borrowed in important measure from the United States Constitution.

The International Human Rights movement — mankind — learned from us but it has indeed bettered our instruction in significant respects. The International Bill of Rights — the common designation for the Universal Declaration and the two Covenants descended from it, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights — has included virtually all the rights we have put or found in our Constitution. It has recognized some rights we have not. It has given some rights greater scope than we have. It has given rights generally greater protection than we afford.

A few examples:

A. Cruel and Inhuman Treatment

The United States Constitution forbids cruel and inhuman punishment.²⁶ It forbids compelling a person to be a witness against himself by torture or otherwise.²⁷ But no provision in the Bill of Rights is obviously violated if the police torture a person not as punishment or to obtain evidence. The Constitution appears not to protect against other forms of official mistreatment. On the other hand, the Universal Declaration and the International Covenant on Civil and Political Rights recognize a right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.²⁸ Torture, I note, is forbidden, for any purpose. The International Bill of Rights forbids not only that which is cruel, but also what is inhuman or degrading; not only punishment but any treatment by any official body, for example, by a public school or a public mental institution.

B. Capital punishment

We have not given decent respect to mankind's opinions as to capital punishment. The Supreme Court has held that the United

25. See generally CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

26. U.S. CONST. amend. VIII.

27. U.S. CONST. amend. V.

28. See *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, Article 7.

States Constitution does not preclude capital punishment, not even for a person who committed a crime at the age of sixteen.²⁹ Our allies, our political-ideological "likes" in the world, have abolished capital punishment; we have maintained it and are even extending it to additional crimes. Most of mankind, the near-one hundred states, both developed and developing states, that have adhered to the International Covenant on Civil and Political Rights, have agreed not to impose the death penalty on pregnant women or for offenses committed by juveniles under the age of eighteen.³⁰ The United States has not adhered to the Covenant, and when President Carter signed it and sent it to the Senate for its consent, he suggested numerous reservations, including one that would reserve for the United States the right to execute such juvenile offenders and pregnant women. In 1991, President Bush, too, in asking the Senate to consent to ratification of the Covenant, insisted on the same reservation as to capital punishment for juvenile offenders. We are not likely to execute a pregnant woman because we are a sentimental people and because any woman on "death row" is likely to be there longer than the period of gestation, but we continue to insist on our "right" to execute for juvenile crime.

C. *Various Civil and Political Rights*

The International Bill of Rights has recognized a number of rights that do not have constitutional status in the United States - rights of "personhood" before the law, the right to a nationality, protections for the family, access to public service.³¹ The International Bill of Rights does not require states to give these rights constitutional status and protection, but it does ask that states secure them to every individual. If particular civil and political rights are not protected in the United States by either federal or state constitution, they are vulnerable to the vagaries of the political process.

D. *Basic Human Needs*

Mankind has moved beyond the United States in adopting a broader conception of rights and giving them larger content. The states of the world see rights — human rights — as including not only liberties, not only freedoms from governmental restraint and interference, but also claims on society to guarantee basic human

29. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

30. *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. VI (V), 999 U.N.T.S. 171.

31. The International Bill of Rights also protects honor and reputation; the Bill of Rights does not. Compare *Universal Declaration of Human Rights*, G.A. Res. 217A (XII), U.N. Doc. A/810 (1948) and *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. XVII, 999 U.N.T.S. 171 with *Paul v. Davis*, 424 U.S. 693 (1976).

needs. The Universal Declaration has recognized as human rights, equally with human freedoms, a right to work, to leisure, to food, housing, health care, to a decent standard of living, to education. In the International Covenant on Economic, Social and Cultural Rights, mankind — more than 100 states — has recognized obligations and made commitments to satisfy such basic human needs to the maximum of available resources.³²

The United States contributed to mankind's recognition of such rights: President Franklin Roosevelt included "freedom from want" among his famous "Four Freedoms," and he proposed an economic Bill of Rights.³³ Eleanor Roosevelt was a principal architect of the Universal Declaration, including its list of economic and social rights. In the United States, such rights, some of them recognized as entitlements pursuant to legislation, are generally not protected by the United States Constitution. The Supreme Court has held that the right to eat — the right to welfare — is not guaranteed by the Constitution, and when a state decides to provide social welfare payments, that entitlement is not a fundamental right or interest.³⁴ A state need not provide for all equally if there is some reason for inequality.³⁵ Similarly, there is no constitutional right, no fundamental interest in, education; no constitutional right to work; no constitutional right to housing.³⁶

The United States is a welfare state, by Constitutional tolerance and legislative mandate. That we have not constitutionalized such rights may not be important if we respected them and realized them in fact. But the absence of constitutional mandate leads to uncertainty of commitment and to deficiency in fact. The character and extent of our welfare society are subject to competing budgetary requirements and are victims of resistance to adequate taxation. There is also significant ideological resistance from an economic philosophy addicted to laissez-faire and the mythology that the basic needs of all can be met by what will "trickle down" in a free market economy. In the result, we do not ensure that the basic human needs of all are satisfied. And we show no inclinations to join mankind in international undertaking to do so by adhering to the Covenant on Economic, Social and Cultural Rights.

32. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, art. II, 993 U.N.T.S. 3.

33. See 87 CONG. REC. 44, 46-47 (1941); 90 CONG. REC. 56-57 (1944).

34. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

35. *Id.* at 485.

36. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (no constitutional right to work); *Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (no constitutional right to education); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no constitutional right to housing).

E. Equality

We owe a decent respect to the opinions of mankind also in regard to our conceptions of equality. Mankind — the states of the world — have accepted equality as a pervasive, even dominant, value; the UN Charter and international human rights instruments seem to reflect a large vision of equality. The conception of equality in the United States Constitution, I suggest, has been — and remains — more limited. Lord Acton wrote that in the 18th century, liberty was the watchword of the middle class, equality of the lower class.³⁷ Ours was and remains a middle class constitution.

Equality, all know, is prominent in the Declaration of Independence, but it was not mentioned at all in the Constitution or in the Bill of Rights. It was patched on later, after the Civil War, by the Fourteenth Amendment, but it has remained a patchy conception.³⁸

As a result of the Fourteenth Amendment, the Constitution now provides that no state shall deprive any person of the equal protection of the laws.³⁹ Equal protection is a fundamental right, a safeguard against invidious discrimination by government.⁴⁰ But the equal protection of the laws is a limited version of equality. It is commonly translated as “equal treatment,” but it requires only treatment that is equal formally, even if not in effect. In the now-commonplace citation to Anatole France, equal protection is the “majestic equality of the law that denies to rich and poor alike the

37. LORD JOHN E.E. DALBERG-ACTON, *HISTORY OF FREEDOM AND OTHER ESSAYS* 88 (Figgis and Lawrence eds., 1916).

38. Even in the Declaration of Independence, however, the equality proclaimed was of limited conception. Essentially, the authors of the Declaration declared equality in liberty; all human beings are equally endowed with inalienable rights to life and liberty; all are equally free to pursue happiness. Therefore, some have suggested, equality is an unnecessary, empty category. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

Even the guarantee of equality in liberty, we have seen, is limited. The Constitution protects liberties only against infringement by the state. See *supra* text accompanying notes 21 and 22.

39. By its terms, the Fourteenth Amendment applies only to the states. Nearly a century later, the Supreme Court found that the due process of law required of the federal government also includes the equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954). “It is unthinkable,” Chief Justice Warren said, “that equal protection be required of the states but not of the United States government.” *Id.* at 500. It is indeed unthinkable, but apparently neither the Framers of the Fifth Amendment in 1789-91, nor those who wrote the Fourteenth Amendment in 1868 intended that the Constitution should require the federal government to accord the equal protection of the laws. It remains to be seen whether Chief Justice Warren’s construction will survive the drive by some justices to revert to the original intent of the Framers in construing the Constitution, and if so, how these justices will justify it.

40. The right to equal protection has important use also in the service of liberty since by requiring that the law regulate all equally, it may discourage the regulation of any.

right to beg, to steal, or to sleep under the bridge at night."⁴¹ Our constitutional jurisprudence permits government to accord unequal, compensatory, treatment to unequals in order to achieve equality in effect, but government is not required to do so, and our laws accord such compensatory treatment only haphazardly, unevenly. Even that extraordinary deviation from equality added to the Constitution by the Sixteenth Amendment, which provides for unequal taxation according to ability to pay, only *permits* progressive taxation; it does not require it. Nor does it require that when government resorts to progressive taxation it must follow principles of progression that assure that the tax is rational and just. In fact, regressive forms of taxation — equal taxation — continue to be common, and are often preferred.

The United States constitutional commitment to equality, then, is only to formal equality in our rights to liberty and in official treatment.⁴² We see equality in liberty as providing equality of opportunity and are proud of such equality. But that commitment is only to formal equality of opportunity to pursue our happiness; it does not include commitment to assure authentic equality of opportunity, a "level playing field." Interestingly, although there is no commitment to education in the United States Constitution, there is in many state constitutions, and we do not doubt our obligation to provide an education for everyone, presumably because we recognize that an adequate education is necessary for authentic equality of opportunity. Yet we apparently will not recognize that adequate food and housing and health care are as necessary as education for meaningful opportunity to pursue one's happiness. Surely, the Constitution does not commit us to what seem to be clearly compelling public ends and needs — pursuing a goal of less inequality in fact, to eliminating gross economic-social inequalities, to eliminating gross maldistributions, to eliminating — precluding — the growth of a permanent "underclass" of a society riven by "caste."

That the Constitution does not commit us to a richer conception of equality does not prevent the United States from making that commitment through the political process, but our political commitment to those ends also has been limited. It is limited by the same forces that limit our commitment to being a welfare state — competing budgetary demands, resistance to taxation, ideological opposition.

In one respect, opponents have also raised constitutional objections to programs for equalizing opportunity. It has been recog-

41. ANATOLE FRANCE, *LE LYS ROUGE* 117-18 (Calmann-Levy ed., 1925).

42. We are not committed to strive for equality in effect, even in the enjoyment of our liberties. Our freedom of expression and our freedom of the press, are not equally enjoyed by the weak and poor as by the rich and powerful.

nized that as a society we can promote greater equality, or less inequality in fact, as a societal purpose; that we can do so by programs taking account of poverty and need; but there is a strong view that we cannot pursue that aim by using "race" as a category for benign programs of regulation or spending.

I do not wish to revisit the constitutionality of various programs commonly lumped together as "affirmative action," but I see no principled reason why under the Constitution we cannot take account of race for benign purposes. The notion that our Constitution is "color-blind" was an essential and noble sentiment when, and for the purposes for which, it was proclaimed — to reject racial segregation.⁴³ It was not intended to preclude reference to race in designing means to achieve valid benign purposes. Why should it be? If race is not to be used, it must be for other reasons — from fear that it will be abused, that some members of the group being advantaged will be stigmatized and their achievements depreciated, that racial distinctions breed resentment by others. But how do these objections balance in constitutional scales against major, compelling societal need?

In particular, we ought to reexamine the mythology of "merit." I see no constitutional merit to "merit"; it is not a constitutional term or value; what is more, it is a "loaded" term: it suggests *desert*. But it is not clear to me that, say, a person having a higher I.Q. "deserves" priority, such as preference for public goods, including admission to a state university. We do not suggest such priority, I note, in public education below the college level.⁴⁴

In the United States, I conclude, equal treatment seems to be more weighty in our constitutional balances than the promotion of authentic equal opportunity and the reduction of inequalities; in the United States, equality seems to be less weighty than liberty (freedom of choice), property (levels of taxation). Mankind has not developed a coherent attitude towards equality but it seems obvious that others have a larger vision of, and stronger commitment to, equality in principle and in its competition with liberty and property.

The United States and mankind also balance liberty and equality differently in one particular context. We are virtually alone in the extent to which we favor freedom of speech over considerations

43. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The dissenting views were vindicated when *Plessy* was overruled in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

44. There is irony in this insistence on objective criteria; historically, merit was introduced as a consideration in order to promote equality, *i.e.*, to preclude a spoils system, or to prevent invidious discrimination against minorities. Should such objective tests be enshrined and made absolute as an obstacle to achieving a richer, more authentic equality?

of equality in that we tolerate even "hate speech," including advocacy of racial discrimination. (I, too, have been committed to the prevailing United States view on this issue, but a decent respect to opinions of mankind may require at least that we think fresh thoughts on these matters.)

F. *Protecting rights*

Mankind also asks better protection of recognized rights than our Constitution requires. In principle, we long ago — before the Constitution — recognized the need for governmental protection of our rights: the Declaration of Independence declares that "to secure these rights governments are instituted among men." The Constitution (and the Bill of Rights), however, provide only limited security for rights. They guarantee only against invasions of rights by government, by "state action," not by one's neighbor. Even as regards governmental violations of rights, the Constitution does not require Congress to enact laws to safeguard against them or to provide remedies to the victim. The Fourteenth Amendment gives Congress power to enact safeguards against and remedies for violations by the states,⁴⁵ but does not require Congress to do so. Power for Congress to protect against federal violations and provide remedies for the victim had to be found in powers intended for other purposes, *e.g.*, the Commerce Power. Congress enacted important civil rights laws at two periods in our history, after the Civil War and in the 1960's, but they provide less than complete remedies.

International human rights instruments require fuller protection and more effective remedies. States are required to respect as well as to ensure recognized rights: officials must *respect* them, laws must *ensure* against private violation. States are *required* to enact legislation necessary to meet both obligations, and are *required* to provide adequate remedies to victims.⁴⁶

III. UPDATING OUR BILL OF RIGHTS

The international system seems to have improved on our Bill of Rights, in some respects by reverting to our own historic ideology. Shall we update our Bill of Rights by amending the Constitution? In principle, why not? State constitutions are amended easily and regularly. Amendment of the United States Constitution is not sacrilege. The Framers ordained the United States Constitution as a *more perfect union*, not as a *perfect union*; if indeed, as John Mar-

45. See U.S. CONST. amend. XIV, § 5.

46. *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. II, 999 U.N.T.S. 171.

shall said, it was "intended to endure for ages to come,"⁴⁷ we are now ages and ages later. The Framers contemplated and provided for constitutional amendment. As regards rights, the Bill of Rights itself was adopted by constitutional amendment. The Ninth Amendment, emphasizing that there are other, unenumerated rights,⁴⁸ surely contemplated that such other rights might be added by further amendment. We have in fact added some protections for some rights by later amendment.

But constitutional amendment, we know, is a distant, uncertain, unpromising prospect. During 200 years, the United States Constitution and the Bill of Rights have become holy writ. Since the Bill of Rights was adopted, in effect as part of the "original package," the Constitution has hardly been amended; the Bill of Rights itself has never been directly amended.⁴⁹ Proposals to open the Bill of Rights to amendment might unleash repressive forces, or invite amendments to give constitutional preference to some rights as against others, to the rights of some at the expense of the rights of others.

In any event, constitutional amendment would require a broad consensus, and if we are agreed that it is desirable to bring our rights up to date, it is not necessary to amend the Constitution to achieve it. Much can be done by reinterpretation, and it would not require radical or novel modes of interpretation. Our prescient Framers recognized the need to respond to change and sometimes used terms that permit ready response. For example, "unreasonable searches and seizures" now mean unreasonable in the 20th and the 21st centuries. The Constitution forbids punishment that is cruel and unusual now, not what was cruel and unusual in 1791. The Bill of Rights requires process of law that is due today, not then.

In the past, it was established constitutional doctrine to draw on the opinions of mankind to illuminate constitutional concepts, notably in the interpretation of what is perhaps our most basic constitutional concept and value, due process of law. Earlier in this century, in interpreting due process, the Court said: "there is . . . nothing in Magna Charta [which] ought to exclude the best ideas of

47. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

48. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. XIX.

49. There has been no serious move to amend the Bill of Rights in our day, other than to limit the First Amendment to permit Congress to legislate against flag burning. Fortunately, we avoided that threat.

The Bill of Rights was *extended* by the Civil War Amendments and by the successive prohibitions of discrimination in voting (on grounds of race, gender, age). See *supra* text accompanying notes 9-15. Other rights amendments failed, in our time, notably, the Equal Rights Amendment.

all systems and of every age."⁵⁰ For Cardozo, "ordered liberty," and "a fair and enlightened system of justice" were not parochial, provincial concepts.⁵¹ When the Court said that due process forbids what shocks the conscience,⁵² it meant, I am satisfied, not only our conscience but mankind's.

It was not until the other day that we began to insist that due process was a parochial concept, that the opinion of mankind was not constitutionally relevant. In *Thompson v. Oklahoma*,⁵³ in considering whether it is indecent, cruel, to impose capital punishment for crimes committed by juveniles (under age 18), Justice Scalia said:

The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries, is totally inappropriate as a means of establishing the fundamental beliefs of this nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.⁵⁴

In 1989, in *Stanford v. Kentucky*,⁵⁵ Justice Scalia's footnote in effect appears in a majority opinion: "We emphasize that it is the *American* conceptions of decency that are dispositive."⁵⁶ Yet in each of these and other cases, dissenting or concurring Justices demonstrate that the Constitution can be construed differently, to bring our 18th century Bill of Rights up to 20th and 21st century standards, to reflect respect to the opinions of mankind.

IV. ADHERING TO INTERNATIONAL HUMAN RIGHTS AGREEMENTS

If constitutional amendment or enlightened constitutional interpretation is not available, our rights jurisprudence could be updated by international commitment, by adherence to the formal expressions of the opinions of mankind in international human rights instruments. Now some 100 countries have adhered to the Covenant on Civil and Political Rights, and some 100 countries have adhered to the Covenant on Economic, Social and Cultural Rights. The United States was a leading participant in promoting interna-

50. *Hurtado v. California*, 110 U.S. 516, 531 (1884).

51. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *rev'd on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969).

52. *See Rochin v. California*, 342 U.S. 165, 172 (1952). *See also Palko*, 302 U.S. at 323.

53. 487 U.S. 815 (1988).

54. *Id.* at 868 n.4 (Scalia, J., dissenting).

55. 492 U.S. 361 (1989).

56. *Id.* at 369 n.1.

tional human rights, in developing their content, even in drafting those international covenants. But the United States is not a party to them or to other major human rights conventions.⁵⁷

The United States record in respect of the human rights agreements is itself a failure to pay decent respect to the opinions of mankind, a source of continuing reproach and embarrassment, an obstacle to our support for human rights around the world. All our allies, and all the new would-be democracies in Eastern Europe, are parties at least to the International Covenant on Civil and Political Rights. In August 1991, finally, President Bush asked the Senate to consider the International Covenant on Civil and Political Rights signed by President Carter in 1977. But like the Carter Administration, the Bush Administration has proposed, and the Senate will doubtless impose, reservations that will raise serious questions about the sincerity of our commitment, will demonstrate our insistence on paying little respect to the opinions of mankind, our unwillingness to change our ways even in the smallest way.⁵⁸

United States adherence to the International Covenant on Economic, Social and Cultural Rights, too, would meet the most frequent challenge by opinions of mankind that the United States idea of rights is still reactionary, stuck in the 18th century. That welfare rights are different, "positive rights," that they may be difficult and some of them even inappropriate for judicial enforcement, are not accepted as decisive reasons for refusing commitment to these rights as basic values and to a higher international standard of welfare rights in practice. There is no sign that the United States will even consider responding to that challenge by mankind and adhere to that Covenant. We do not reject our welfare programs, but we are unwilling to make an international commitment to be and remain a welfare state. Despite the Four Freedoms and the Universal Declaration, we refuse to recognize economic-social rights as rights.⁵⁹

If we will not update our Constitution, if we do not adhere to international instruments, we can close the gaps between our Bill of Rights and the opinions of mankind by legislation. For example, Congress, I am satisfied, could adopt by law what the Equal Rights Amendment would have done by amendment. By new civil rights acts, Congress could largely secure rights against private invasion; give more effective remedy against official violation (state or federal); legislate against inhuman and degrading treatment and pun-

57. In 1988, we finally ratified the Genocide Convention after it had lain on the Senate shelf for 35 years then several years after Senate consent. Our ratification of the Convention Against Torture is still awaiting the enactment of implementing legislation.

58. See *supra* text accompanying notes 29 and 30.

59. See *supra* text accompanying note 33.

ishment and limit capital punishment; enlarge our concepts of equality to include authentic equality in the enjoyment of rights in fact, authentic equality of opportunity, and steps to reduce inequality in result; by more just taxation and more compassionate spending Congress could guarantee and assure to every inhabitant minimal basic human needs.

V. THE RIGHTS OF OTHERS

Recently, increasingly, the United States has been challenged to respect the opinions of mankind by respecting the rights of others. In its last Term, the Supreme Court ruled that the Fourth Amendment did not apply to protect a citizen of Mexico against an unreasonable search of his house and seizure of his property in Mexico by United States officials.⁶⁰ In the Court's opinion, there may be broader implications that none of the provisions of the United States Constitution and the Bill of Rights apply outside the United States, at least with respect to nationals of other states. If so, the Court may be moving to reject the view expressed by Justice Black in 1948 for a plurality of the Court that the Constitution governs actions by the United States wherever they occur.⁶¹

Mankind may have no basis for insisting that we observe our own Constitution even in their territory, but others are entitled to ask that we respect the rights of their citizens, whether or not our Constitution requires us to do so. If the Bill of Rights does not apply to what the United States does in a foreign country, other states are entitled to demand respect for their values, especially for values that mankind generally has accepted by international norms. In particular, United States officials have apparently been entering the territory of other states to abduct persons for trial in the United States. The capture of Noriega in Panama is only the most famous instance, and involved not only a kidnapping but a military invasion leaving hundreds of casualties.⁶² Individual abductions from other Latin American countries, notably Mexico, suggest that the United States may now be using kidnapping as standard operating procedure in law enforcement.⁶³ A reported Department of Justice

60. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

61. *See Reid v. Covert*, 354 U.S. 1, 5-14, 16-17 (1957).

62. *See generally* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991).

63. *See, e.g., Verdugo-Urquidez v. United States*, 939 F.2d 1341 (9th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3378 (U.S. Oct. 21, 1991) (No. 91-670)); *Alvarez-Machain v. United States*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 84 AM. J. INT'L L. 444 (1990); Andreas F. Lowenfeld, *Kidnapping by Government Order: A Follow-Up*, 84 AM. J. INT'L L. 712 (1990); Andreas F. Lowenfeld, *Still More on Kidnapping*, 85 AM. J. INT'L L. 655 (1991).

memorandum supporting the practice promises its continued use, a flouting of the opinions of mankind that is not short of outrageous.

When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states).⁶⁴ Even if the foreign government consented to the abduction, it remains a gross violation of international human rights standards.⁶⁵ When United States officials bring the abducted person to the United States for trial, the due process of law is contaminated.

A 100-year old case, *Ker v. Illinois*,⁶⁶ is commonly cited to support the principle *male captus, bene detentus*: although a person was improperly seized he (she) can be kept and brought to trial. The Court followed *Ker* in *Frisbie v. Collins*⁶⁷ in 1952. Both cases are distinguishable from the recent cases; *Frisbee* involved kidnapping from another state in the United States, not from a foreign country; *Ker* apparently involved kidnapping by private persons, not by United States officials. *Ker* was decided during a period in United States history noted for both xenophobia and indifference to the opinions of mankind; other cases during that period have long ago been discredited.⁶⁸ It is time to abandon also *Ker-Frisbie*, cases that tolerated and thereby encouraged kidnapping. If officials stoop to such practices and drag the United States down in the opinions of mankind, will courts rise to the occasion to deter and effectively end such practices? Surely, there is ample ground in the concept of due process, ample authority in the supervisory responsibility of courts for the administration of justice, for refusing to give judicial imprimatur to such gross disrespect for the opinions of mankind.

On this subject, the Republic of South Africa — the Republic of South Africa! — has recently set a worthy example. In dismissing the prosecution of a person kidnapped from a neighboring country,

64. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 475, intro. note to Pt. 7 (1986).

65. See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (recognizing everyone's right to security of the person, to freedom from inhuman or degrading treatment, from arbitrary arrest, and from arbitrary interference with his or her privacy).

66. 119 U.S. 436 (1886).

67. 342 U.S. 519 (1952).

68. For example, the upholding of capital punishment imposed by a consular officer, *Ross v. McIntyre*, 140 U.S. 453 (1891), was declared a relic of an earlier age in *Reid v. Covert*, 354 U.S. 1, 12 (1957); *Chae Chan Ping v. United States*, 130 U.S. 581 (1887) (the Chinese exclusion case), is a shameful reminder of that era which we are still living down. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

the Court of Appeal, South Africa's highest court, concluded that fundamental legal principles were involved and had to be respected. These principles included:

those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to court with clean hands . . . This requirement was not satisfied when the State was involved in abduction across its borders.⁶⁹

CONCLUSION

The citizens and other inhabitants of the United States have ample reason to be proud of the Bill of Rights, and proud to celebrate it. But pride, and celebration, need not blind us to its remaining inadequacies and continuing deficiencies as others continue to tell us. Mankind does not always have a clear opinion, and mankind is not always right. For example, we do not have to change our particular form of judicial review, or give up our jury system merely because others have not seen fit to welcome them. We may have higher respect for freedom of the press or other freedom of expression, even, for example, in regard to "hate speech" or the libel of officials. But our perception of ourselves as "beacon on the hill" has served to confirm our isolation and our unilateralism in ideas as in international politics, and recent Supreme Court cases only reinforce those tendencies. A decent respect to the opinions of mankind requires that we consider what others think and do, that we do not insist that we have nothing to learn.

Like our political ancestors in 1776, we do owe decent respect to the opinions of others. If we attend to those opinions, we may conclude that there are sometimes good reasons to heed them and to improve our ways in some respects. We can update, modernize our jurisprudence by honest constitutional interpretation, by adhering to international instruments, or both. I have suggested that we ought to broaden our conception of rights; add some rights and extend the scope of others; attend to the opinions of others to illuminate our own values as to what is reasonable, what is cruel and unusual, what is due process; improve our protection of rights; adhere to international human rights instruments; refrain from violating the territorial integrity of other states and from kidnapping human beings from other countries. That we pay respect to the

69. *State v. Ebrahim*, 1991(2) S.A. 553, 582 (A.) (citing authority back to the law of Rome).

opinions of mankind, that we learn from others, will help make ours "a more perfect union" as well as a more glorious beacon on the hill.

