

DEFENDING HUMANITY

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This chapter consists of a talk I gave, in March 1998, as the keynote speech for a public interest law conference in New Hampshire. The conference, named after a great law professor and civil rights activist named Robert Cover, brings about one hundred students, a dozen law professors, and about forty public interest lawyers to rural New Hampshire for a weekend retreat. People come to the conference from all over the country, united by two common attributes: (1) all those attending are interested in or currently practicing law in the public interest, which usually means free legal services to poor people, prisoners, victims of discrimination, and other politically unpopular groups of people; and (2) all those attending share a willingness spend a weekend bunking with several other people in a wooden cabin in snowy, rural New Hampshire for the sake of fellowship with people who share their ideals.

Each time I have attended the conference, I have found it incredibly inspiring. The conference at which I gave this speech has a particular meaning for me since it came to represent for me a remarkable coincidence, a coincidence to which I cannot, for better or worse, fail to impute some deeper meaning. Robert Cover, in whose memory the conference was named, died an all-too-early death from cancer. Moreover, my bunkmate at the conference was a law student from Yale whose father, another well regarded law professor, also met an early death from cancer.

Less than two weeks after I delivered this speech, I was diagnosed with an advanced form of colon cancer. As I look back on the speech, I find myself thinking that if I had been asked to give a valedictory of sorts to my life, I would not be unhappy to have what follows as my final words.

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Since we are in New Hampshire, it seems especially appropriate that I begin with my favorite story of one of New Hampshire's most loved sons: Theodore Geisel, otherwise known as Dr. Seuss. The story is called "Horton Hears A Who." The story is about an elephant named Horton who, because of his extraordinarily large ears, becomes aware that a community of microscopic people called *Whos* live on a dust speck that sits atop the blossom of a single flower.

Horton's enhanced auditory ability is, of course, a metaphor for a heightened moral sensitivity. Once Horton is aware that people live on the dust speck, he acts accordingly, doing everything within his power to protect them.

The other animals in the jungle are not able to hear the voices of the *Whos* and consequently do not recognize that persons live on the dust speck on the flower. They find Horton's way of relating to the dust speck—and insistence that others act similarly—offensive and bizarre. They mock Horton. They abuse him. They think him insane. They take the blossom on which the dust speck sits and hurl it into a valley of billions of identical blossoms, endangering the lives of the *Whos* and forcing Horton, the *Whos* advocate and protector, to endure countless hours of difficult and tedious work in finding them.

Finally, in the story's climax, the other animals assault and imprison Horton, intent on boiling the dust speck on which the *Whos* live. But this is a story by Dr. Seuss, and at the last crucial moment the *Whos*—whom Horton has been exhorting with the slogan "If you only make yourselves heard you don't have to die!"—manage to organize themselves to speak one unmistakably audible "We are here! We are here!"

The other animals hear the voice, recognize that Horton was right all along, and now aware of the personhood of the *Whos*, change their behavior accordingly.

I start with that children's story, not to be funny or sentimental, but because I think it powerfully conveys, in a simple and beautiful way, the central idea on which I will reflect: the idea of human rights. That is to say, the unique, the profound, the unavoidable moral and political consequences that flow from the recognition that the other whose presence we share is a person, a human being.

The legal document I take for my textual inspiration is the Universal Declaration of Human Rights of 1948. Ratified when memories of the Holocaust and Nuremberg were still freshly seared into the world's memory, the Declaration celebrates its 50th anniversary this year. The topic I have chosen in keeping with the theme of this Cover Conference is *Defending Humanity: The Practice of Public Interest Law and the Idea of Human Rights*.

What I have to say will not be an academic discourse in which a thesis is argued or idea analyzed. There exists a significant body of progressive literature on international human rights covenants. I commend that literature to you. That literature makes cogent arguments for the justiciability of those rights and their application to some of the issues we care most about: the right to housing, the right

to an adequate education, and the abolition of the death penalty.

Instead, the rhetorical form I have chosen is one I encountered as a Jesuit novice. That form my master of novices called the “ferverino.”

As I understand it, the ferverino is a deliberate preaching to the choir. In English, the metaphor of preaching to the choir is invariably pejorative, but I do not see why that is necessarily so. Even the choir—the true believers, the already converted—sometimes grows tired and discouraged, is sometimes tempted to despair. The point of the ferverino, or so I gathered from my master of novices, is to act as a moral call to arms, to inspire and console, to put into words and thereby make present the ideals we cherish and in which we believe. And in that act of making present, the hope is that we will remember how much those ideals mean to us and be strengthened in our commitment to them.

So the text I take for reflection is the Universal Declaration of Human Rights. I’ll augment my reading of that text with two other international agreements: the International Covenant on Economic, Social, and Cultural Rights; and the International Covenant on Civil and Political Rights, both proposed in 1966 but entered into force in 1976.

The guiding premise of the Universal Declaration of Human Rights is found in the first paragraph of its preamble: “the recognition of the inherent dignity and of the equal and inalienable rights of the human family is the foundation of freedom, justice, and peace in the world.”

The articles of the Universal Declaration of Human Rights then go on to enumerate those rights, including the freedoms with which we are familiar from the first ten amendments to our own constitution, but also including rights to health care, education, a just living wage, and social security, the sorts of economic and social rights regrettably not secured by the Constitution of the United States.

The Declaration is a beautiful document, even if—as with so many of law’s best promises—its strength has been more in preserving aspirations than providing enforceable legal rights. I want, however, to dwell on three fundamental implications of the idea of human rights and their relevance to the work of public interest lawyers.

First, human rights imply a shared human nature.

Second, people are not things and should not be treated as things.

And third, defending the human rights of others is itself a constituent part of leading a good and happy human life.

The Universal Declaration of Human Rights takes as its empirical

premise that all human beings share certain critical attributes and needs. Without that empirical premise, the Declaration, indeed the concept of human rights itself, is meaningless. That set of common attributes and needs I'll call our shared human nature.

In using the term "human nature," I realize I am courting controversy. On the political right, "human nature" is a term fraught with specific teleologies of what constitutes the proper end of human life. Defenders of market economics, various social Darwinist schemes, capital punishment, and all sorts of harsh and punitive forms of social organization will invoke this thing called "human nature" to justify the oppression and subordination of other human beings.

On the left, sensitivity to cultural diversity, opposition to anything that smacks of essentialism, and an at times excessive form of social constructionism make the idea of a shared human nature singularly unwelcome.

Nevertheless, I will insist on using the term and using it in the following sense: by "human nature" I mean the shared attributes and needs that all human beings possess regardless of gender, race, creed, national origin, sexual orientation, disability, or any other accident of time or place. The Universal Declaration of Human Rights and subsequent covenants identify some of those common human physical needs: food, shelter, medical care; but also psychological needs for education, relationships, self-determination, and that quality in human beings that our own legal tradition calls "liberty."

From the empirical reality of human nature derive two hopeful corollaries.

First, oppression always requires work because it meets the resistance of human nature. That seems so obvious, but sometimes when we are struggling against oppression it may seem that iniquity is effortless, while justice requires impossible exertions of energy to bring about and sustain.

Don't believe it.

Wherever human beings are denied the things they need for flourishing—food, shelter, work, education, liberty or dignity—they *will* act out. That is why oppressive regimes must invest so much time, energy, money, and resources in the instruments of collective deception and social coercion: propaganda, the military and the police. In our own country, it is why our continued neglect of the basic human needs of tens of millions of people goes hand-in-hand with a massively expanded and still expanding prison system, and an ever more punitive system of criminal justice.

The recognition of a shared human nature should also give us hope that we who so frequently define ourselves by and organize around so called issues of identity—gender, race, sexual orientation—can transcend those differences and both find genuine connection and build lasting alliances with others who struggle for justice. The reason for that hope is grounded in the recognition that we can move beyond the things that divide us because we are united in something more fundamental than and prior to those status attributes: a common humanity.

That brings me to my second point: people are not things and should not be treated as things.

When we recognize someone as a human being, we acknowledge that we must relate to him or her in a certain way. That is the whole point of the Dr. Seuss story with which I began. It is a point grasped immediately by every child to whom I have ever read the story. That recognition is the basis of the empathic ability that underlies the so called “Golden Rule.” It is, or so I am led to believe by contemporary neurological science, a capacity that is effectively hard wired into the human brain by the time an infant is a few months old.

An ocean of ink has been spilled, much of it by legal academics, on the relative usefulness of thinking about our special relationship to other human beings in terms of rights or obligations. That distinction is irrelevant here. What is relevant is that we hold fast to and act upon the conviction that simply because an other is a person, a human being, he or she has legitimate claims to make on us as individuals and as a society.

Almost everything we do as public interest lawyers can ultimately be expressed in these terms: demanding that our clients be treated as the human beings they are, and that our political community honor the claims our clients’ humanity makes on that community.

People are not things. It seems so absurdly obvious as to be unworthy of articulation. But remember this: the single most powerful organizing force in our nation and the world today—Capitalism—asserts precisely the opposite, namely, people *are* things and are to be treated as things.

I do not say that as some kind of inflammatory ideological remark. I am simply making a statement of fact. Capitalism is premised on the notion that human labor is a commodity; a thing to be bought and sold like any other commodity on the open market. In its most abstract and rarefied mathematical expression—the equations and formulae of theoretical economics—labor is one more variable in the cost of production, indistinguishable from any other variable. If a

firm can double its profits by cutting energy costs in half, then that is what the logic of the market says a firm must do. If a firm can double its profits by firing half its workforce and thereby destroying a community, the market's imperative is no different.

In actual practice, in the day to day operations of markets, the treatment of people as things is just as evident. Whether in downsizing workers, destroying unions, or making decisions about product safety, the qualitative difference between human beings and things is either ignored or effaced by a relentless process of monetarization and commodification. As Robert Kuttner put it in a book of his last year, "Everything [is] For Sale." That is to say, everything is a commodity.

The dogma of the reigning market religion—which you have surely encountered in the speeches of many politicians and that school of thought called "Law & Economics"—preaches that this endless process of commodification and profit maximization will ultimately redound to the common good of humanity. The metaphor most often employed is a great rising tide that lifts all boats. But the sorts of people public interest lawyers serve are drowning in that tide.

While macroeconomic realities may seem remote from our work, we must acknowledge that late twentieth century Capitalism is the context for all we do. It must be reckoned with. To the extent that we see ourselves as defending human rights, we have no choice but to resist Capitalism's drive to commodify everything. That drive is aimed at nothing else than eradicating the qualitative moral differences between our treatment of people and things.

I now arrive at my third and last point. In our work to protect the human rights of our clients we are making a good and happy human life for ourselves.

As I grow ever closer to my fortieth birthday, I become ever more convinced that there is really only one important question from which all others flow: *In what does a good human life consist and how do we go about living such a life?* That question was much on the mind of Socrates. It was the question he so relentlessly and persistently and infuriatingly put to the businessmen, priests, politicians, generals, rhetoricians, and intellectuals of his day. Though I did not know Robert Cover personally, from reading his own words and words written about him, I think it safe to say that the same question was much on Bob Cover's mind.

The Universal Declaration of Human Rights gives a partial answer to the first part of that question: freedom, food, family, education, safe and decent work at a living wage. What may not be so apparent is

that in fighting to secure those things—those human rights—for other human beings, public interest lawyers are answering Socrates' question, Robert Cover's question, for themselves.

Our lives are the only things that are completely ours. The kind of life we make is the most important work, the single most significant project we will ever undertake.

One of the things that makes me saddest when I talk to law students and lawyers is the recurring impression I get that they have lost a sense of their own agency, i.e., the sense that their lives are theirs to make of what they will. Because of that loss, people who are among the most gifted and privileged in the world instead live with a sense of drastically constricted possibilities of what they can do with their lives.

I understand how frightening it can be. How crushing the burden of debt can seem. Still, I want to cry at the failure of imagination and loss of promise represented by all those law students—and there are thousands of them—who enter law school dreaming of doing great things in the pursuit of justice, only to find themselves defending corporations.

I suppose what I am trying to say is that in my own life as I have struggled with the question of what makes a good and happy human life, I have become ever more convinced that struggling to secure the conditions for a decent human life for others is a large part of the answer.

I know it is not easy. Just as the Universal Declaration of Human Rights marks its 50th anniversary, this year I mark the 10th anniversary of my departure from the Society of Jesus, a Roman Catholic religious order probably better known to the students at Boston College and Georgetown as “the Jesuits.”

I had known much happiness as a Jesuit. By most reports, I was very good at being a Jesuit. But while teaching high school seniors, I became involved in a controversy surrounding one of my students. The student had been subjected to an official inquiry, a temporary suspension, and threats of not being graduated with his class for painting and displaying a picture for which he had received approval from the chairperson of the school's art department. Unfortunately, for my student, the picture caused a controversy in the school community and greatly upset the school's president.

The details of the story are too complex and too many to relate here. Suffice it to say that the student came to me to protest the way he had been treated and to ask for my help. I was warned by fellow Jesuits that the consequences of my advocacy might be dire. They

were right.

I took up my student's cause, protesting to both faculty and administration about the unfairness of the process to which my student was subjected. The student emerged without further harm. The investigative process was ended, no further disciplinary action was taken, and he graduated with his classmates. But my advocacy on my student's behalf had so angered and alienated my religious superior that my life as a Jesuit came to an end.

I cannot tell you what it was like for me on the June day in 1988 when I left the Jesuits. For six years it had been my whole life. Being a Jesuit had become integral to my identity. Losing that was not unlike getting a nasty divorce, losing your job, and being evicted all on the same day. In one fell swoop I lost my home, my job, my community, and a large part of my identity.

I had very little money and very little idea of what I would do. And for what? So that a 17-year-old kid could paint the pictures he wanted to paint and have his human rights of due process and free expression respected. For that, I jeopardized and lost everything that gave me security.

But I have *never* regretted it! The universe was kind to me. I landed on my feet—in law school of all places—and became a public interest lawyer.

I tell this story to impress upon you this point: courage is often the better part of freedom. If you want to make a happy and good human life for yourself and help secure such a life for others, you must be brave. Immersing yourself in the suffering of others can be heart-breaking. But just the endeavor to relieve human suffering will bring you great, great joy.

Let me end with a truly great orator's words, words that I think are applicable to the struggle for human rights and the practice of being a public interest lawyer.

The words come from the second century C.E. Roman Marcus Tullius Cicero, and they are drawn from his essay on friendship. Cicero is responding to an argument he associates with the Epicureans, the argument that we should not befriend others, much less the poor and suffering, because they will only add their troubles to our own. This is what Cicero has to say in response:

What a magnificent philosophy! Why, they take the very sun from the sky, I should say, when they take friendship from life, for of all the gifts the gods have given us, this is our best source of goodness and of happiness. What, after all, is this "freedom from care" they talk about? In appearance it is seductive indeed, but in actual fact it is something that in many circumstances deserves only contempt.

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For it is not in accord with sound principle to refuse to undertake any honorable proposal or course of action or, having once undertaken any such thing, to refuse to go through with it, for fear that one may lose one's peace of mind. If we run away from trouble, we shall have to run away from virtue too, for it is impossible for virtue to avoid trouble in some degree when she shows her contempt and enmity toward things incompatible with herself. When kindness stands out against malice, when self-control stands against wantonness, bravery against cowardice And so, if pain does touch the heart of the wise person—and certainly it does, unless we are of the opinion that every vestige of human feeling has been rooted out of him or her—what earthly reason could be offered for excising friendship, root and branch, from life, for fear that it may become the cause of some slight hardship on our part? For if we remove all feeling from the heart, what difference is there not, I hasten to say, between a human being and an animal, but between a human being and a rock or a stump or anything else of that kind?

Be human beings. Go out and befriend the poor and the oppressed wherever you may find them. Identify those who impoverish and oppress them. And then make some trouble!