The Advocate as Lawmaker: Luis Kutner and the Struggle for Due Process

Ernest Katin

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THE ADVOCATE AS LAWMAKER: LUIS KUTNER AND THE STRUGGLE FOR DUE PROCESS

ERNEST KATIN*

"One can wear the well-concealed armor of Sir Galahad in helping to conquer the dragons of evil and injustice."

Luis Kutner**

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The lawyer is the indispensable middleman of social progress.¹ His role is varied; he is legislator, advisor, arbitrator and judge. Perhaps his most effective contribution is as an advocate in championing the cause of a client who has been wronged. It is in the tradition of the advocate that the legal profession emerges in its most vital role.

Romantically, the lawyer is pictured as taking the unpopular cause, like John Adams' defense of British soldiers accused of murder in the Boston Massacre,² or in Clarence Darrow's, Louis Brandeis', and Louis Marshall's championing of the public interest in opposing the privileged and the powerful. Unfortunately, however, these shining knights do not typify most members of the legal profession who prefer to concentrate merely in comfortable income-producing pursuits, shunning the controversial. But the romantic image still beckons, as demonstrated today by the many capable law graduates who seek to dedicate their careers to public service.³

The advocate makes law. He cannot follow the prototype of the Organization Man in uncritically accepting premises as given and con-
forming to an established behavioral norm. He may not approach the cause of his client with a negative attitude. Even if legal precedent is clearly to the contrary, he must create a strategem to distinguish his client's case or to change the law. The true advocate does not accept the law as settled. To him the law remains unsettled if it is not settled correctly. This is a position which may well run counter to that taken by the judge or the legislator—and of most lawyers—who may prefer to allow matters to remain merely resolved. The advocate, in zealously presenting his client's case, will attempt to demonstrate that the settled law produces an unjust result—an outcome which would shock the conscience. As an adversary, he develops a different perspective of the problem from that of the judge, so that he can present new insights which the judge is compelled to consider. Clearly, the advocate, functioning within the context of the adversary system, assumes a vital role in the process of rendering justice.

Where the advocate perceives a problem which must be rectified, he will not limit his activities merely to the court room. He will be ready to champion reform by calling the attention of his colleagues and the general public to the existence of the problem and in proposing a solution. He will use the law reviews as a sounding board for proposing strategies for change through legislation or by adopting new legal precedents. Louis Dembitz Brandeis' famous Harvard Law Review article in collaboration with a colleague at the turn of the century is a classic example of how an advocate managed to blaze the trail for a new tort which has now become a constitutional right—privacy.

In today's world, the practice of the advocate is not limited to his own country. The problems of the nation and the world demand solution. Like Tolstoy and Ghandi, he must feel responsible for the evil existing in the world and cannot remain idle while his brother suffers. Because of

4. See generally W. Whyte, The Organization Man (1956). The writer recalls that, as a law student, many students were uneasy in encountering the Socratic method, preferring to be spoonfed with given facts with which they felt secure. The writer also found this to be true in teaching college students.

5. Dr. Judith Sklar has asserted,

All judges must sooner or later legislate—create rules either unconsciously or openly. . . To the judge, however, these are frightful occasions. By training and professional ideology he is tied to a vision of his function that excludes self assertion and places a premium on following existing rules impartially. His natural impulse is to find a rule at any cost, or at least to assimilate his decision to a rule as closely as possible. He may even openly evade responsibility. . . [I]t is obviously of great importance to him that the rules he relies on be based on universal agreement among either the experts, the wise, or the whole people. Otherwise the rule becomes a mere opinion—a thought he does not wish to entertain. . .


Holmes, in commenting on lawyers, stated:

I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident and say that really they were taking sides upon debatable and often burning questions.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 468 (1897).

his training and his peculiar talents, he has a specific responsibility as his brother's keeper. He cannot ask—"Who am I?"—in disclaiming responsibility.

Unfortunately, in the writer's opinion, most lawyers are apathetic, preferring the security of the routine and the mechanical in drafting wills and deeds, enforcing judgments on creditors, litigating personal injury claims, filing tax returns and getting couples divorced. Though in these pursuits, the lawyer does perform a public service, much more is involved in the pursuit of a law career if it is to be regarded as a profession. The lawyer, if he is to attain his self-fulfillment, as a person and as a member of a profession, must engage in the creative and realize the satisfaction of public service.

Here and there throughout the land there are lawyers who truly regard their profession with a sense of obligation. They seek the creative and wish to make the world a better place in which to live.

Luis Kutner, a Chicago attorney, is a case in point.

He does not profess to be the greatest or most capable lawyer in his city or in the nation, though he is capable of, at least, holding his own against any adversary in any controversy. Kutner, a wrestler, painter, musician, historian, poet, and biographer, regards a legal challenge as a creative activity. To him the law must provide a remedy for every wrong, every injustice; and if legal precedent has not provided it, he is prepared to create precedent in the fashioning of a new remedy. In pursuing this cause, Kutner has willingly taken on cases without a fee and at great personal sacrifice, though ultimately his vindication of the right has resulted in such fame as to enrich him monetarily and to expand his law practice.

Kutner has also sought to change the law through imaginative legislative proposals presented in law journal articles. His practice knows no boundaries. His most sustained creative endeavor (since 1931) has been the movement for World Habeas Corpus to provide a summary international remedy and adjudication by duly constituted regional international tribunals for any individual anywhere in the world who is illegally or arbitrarily detained.

His legal outlook was affected by a traumatic experience which occurred when he was twelve years old. He had gone angling for goldfish in a Chicago park pond with some friends, and a policeman arrested him and threw him into a basement cell in the Park Police Station. Kutner and his young friends were kept in the cell over the weekend for almost 72 hours. The jail was dark with several inches of water covering the floor and rats swarming about, their eyes shining. His parents were totally unaware as to what had happened. The experience was forever implanted in his mind. Kutner developed a special feeling for the person who is arbitrarily and illegally detained and became particularly sensitive to injustice.
This article is devoted to an evaluation of Kutner's urgent quest for impartial justice and the due process of law as manifested through his writings and cases. Certain significant articles and cases have been selected from a legal career which spans more than thirty-five years in presenting an over-all case study of what one lawyer has contributed to the lawmaking decision process.

I. WORLD HABEAS CORPUS

Habeas Corpus and Luis Kutner are synonymous. He has used this writ to free over a thousand persons. However, his proposal for the use of this writ as an international remedy is most revolutionary. Kutner developed expertise in the use of this remedy while serving as secretary and law clerk to Judge Frank Comerford in the Criminal Courts of Chicago. Persons were arrested on suspicion of having committed a crime and shifted from one jail to another or charged and made to languish in a county jail cell for months without the case being presented for a hearing. Habeas Corpus was the remedy for compelling authorities to reveal where the prisoner was being held and to inquire into the legality of his detention. When state remedies have been exhausted, the federal remedy emerged as a buckler and shield.

In 1930, Kutner encountered the rise of Nazism in Germany with the repeated, publicized spectacle of thousands of arms raised in unison like puppets. This image of the dynamic vitality of hate created a profound impression upon the young lawyer. After a close study of Goering and Goebels and Mein Kampf, Kutner was convinced that Nazism was a world threat, that Jews were to be degraded, dehumanized and exterminated, and that human rights and the rule of law were about to be trampled. After verifying his conclusions about the threat of Nazism in 1931 this young lawyer toured the nation under the sponsorship of the International Optimist Clubs warning Americans, and Jews in particular, of the looming threat of Hitler, only to be shrugged off. With Hitler's appointment as Reich Chancellor, Kutner perceived the urgent need for the international protection of individual rights.

His training and experience with the Writ of Habeas Corpus enabled him to conceive of its use as an international remedy with recourse to adjudication by an international tribunal. Kutner confided his idea to Dean Roscoe Pound, who became his mentor in attracting the support of noted scholars and jurists, including John Dewey. He also received the active cooperation of Harold D. Lasswell, Myres S. McDougal, Quincy Wright, Judge Floyd Thompson, Dean Shailer Matthews and the then Attorney General of the United States, Francis Biddle. The late George Cardinal Mundelein reacted enthusiastically. Kutner, expending his own funds, convened conferences of distinguished scholars and judges to develop the concepts of World Habeas Corpus and formed the Commission for
International Due Process of Law with Dean Roscoe Pound and Hans Kelsen as honorary counsel and world policy and executive committees consisting of such prestigious names as Associate Supreme Court Justice William J. Brennan, Jr., Judge Caroline Simon of New York, General Telford Taylor, Louis B. Sohn, Egon Schwelb and others, along with those who have supported the movement from its inception. Chief Justices and other jurists throughout the world have joined as sponsors with seminars having been held in India, Hong Kong, Japan, Taiwan, Greece, France, Italy and elsewhere. The commission is now affiliated with the World Peace Through Law Center and has the support of the American Bar Association. The proposal of World Habeas Corpus has received serious consideration and endorsement from Ambassador Arthur J. Goldberg.7

Kutner and his associates have elaborated upon World Habeas Corpus extensively in law review articles8 and in a book which has been published by the Oceana Press.9 To Kutner, World Habeas Corpus is a legal ligament for international order in providing protection for the individual as a subject of international law. It is premised on the concept that man, as the subject of international law should have his individual security guaranteed by an international treaty-statute enforceable rule of law involving a concession of national sovereignty but without the impairment of the sovereignty of states. The proposal does not involve the establishment of world government, though it is not incompatible with such proposals. Nation states would still remain the prime actors in international society.

The proposal for World Habeas Corpus urges that respect for human rights is a shared value for world order expressed in diverse and competitive legal systems and national constitutions.10 The protection for human

7. L. Kutner, I, The Lawyer 105 (1967). The author refers to personal conversations with Kutner and to personal observations.


rights has been expressed in international law by the Nuremberg Principles, the United Nations Charter, the Universal Declaration of Human Rights and other international covenants, conventions, agreements and declarations. A means must be found for implementing these rights, and particularly the basic right of freedom from arbitrary arrest and detention. Habeas Corpus and analogous remedies, such as the Latin and South American Amparo, have been adopted by most legal systems. Nevertheless, shocking instances have arisen where human rights have been brutally denied and individuals have been arbitrarily arrested and detained. World Habeas Corpus is proposed as a summary remedy.

Kutner's proposal seeks adherence to a universal standard of respect for human rights while taking account of cultural diversities as expressed in diverse legal systems. Implementing F. S. C. Northrop's suggestion as to the existence of distinct cultural-legal units, Kutner proposes establishing regional circuit courts of World Habeas Corpus to hear cases within each arena of states having a common cultural and legal heritage. He proposes nine circuits consisting of: (1) a Communist-Orient Circuit; (2) USSR-East Europe Circuit; (3) Western Europe Circuit; (4) Islam Circuit; (5) Southern Africa Circuit; (6) Australia and Oceanic Circuit; (7) Non-Communist Orient Circuit; (8) Latin America Circuit; and (9) Anglo-America Circuit. Individuals who are arbitrarily detained, upon exhaustion of all available domestic recourse, would be able, to have the right to appeal to the appropriate regional tribunal for the adjudication of his rights with ultimate appeal to a world tribunal. The tribunals would be staffed with lawyers capable of processing Writs of Habeas Corpus. The tribunal would be empowered to order the detained person to be brought before it and would determine whether he is being lawfully detained in accordance with international respect for human rights, which Kutner regards as comprising an "international due process of law." Each circuit court would be composed of seven judges of whom at least four must be nationals of a state located within the arena or region over which the particular circuit has jurisdiction, with the remaining three judges to be chosen from outside the particular arena. The Supreme Court would be composed of nine justices—one judge from each circuit. Kutner has drafted this proposal in the form of a treaty-statute.

This judicial structure and procedural system, according to Kutner, would provide for review of individual cases of detention by judicial decision-makers and offer a method by which the case may be brought to the attention of world public opinion. Enforcement would be based primarily upon the voluntary compliance of the states involved. Based

11. See generally Kutner & Carl, supra note 8.
13. World Habeas Corpus, supra note 9, at 75-77.
15. This theme is developed in the articles cited in note 8.
on past adherence to decisions of international tribunals and the fact that adjudication would be by a tribunal within a common cultural and legal arena, states would be most likely to comply. He does, however, concede that sanctions might be imposed upon a recalcitrant state by the appropriate regional organization, such as the Organization of American States or the Security Council of the United Nations. The type of enforcement action which would be undertaken would accord with standards of reasonableness in considering the surrounding circumstances of the particular case.

The proposal and the treaty-statute would, of course, be subject to modifications before its ultimate adoption and implementation. For example, the classification of states within the particular circuit is subject to challenge. There is doubt as to whether Indonesia, an Islamic state, should belong in the same circuit with Australia and the Philippines. Furthermore, the Shiite Islamic states may prefer to separate themselves from the Sunni states. Moreover, Kutner places some civil law countries in the same circuit with common law countries, as in the Western European Circuit, Yugoslavia and Rumania may not wish to belong to the same circuit as the Soviet Union.

*World Habeas Corpus* would not usher in the millennium. It would, however, be an instrument for encouraging states to raise municipal standards respecting human rights. Some of the American and Western European states adhere, however, to standards which exceed that set by the international order. The number of cases which the *World Habeas Corpus* tribunals would actually hear would be minimal, with the proposed Supreme Court hearing even fewer petitions. This has been the experience with the use of the Federal Writ of Habeas Corpus in the United States Courts in passing upon the cases of prisoners sentenced under state laws. Only a very small percentage of prisoner's petitions are actually adjudicated, and an even smaller number are heard by the Supreme Court. Nevertheless, the existence of the Federal Writ serves a vital purpose, even if it vindicates the rights of one prisoner in a hundred. Similarly, a Writ of World Habeas Corpus, even though offering protection in only a few cases, would still be worthy of implementation.

Sir Winston Churchill had referred to *World Habeas Corpus* as "the difference between civilization and tyranny." Justice Kotaro Tanaka of the International Court of Justice, former Chief Justice of Japan, believing that the Rule of Law should cover all the world and that "there must be no vacuum in the protection of fundamental human rights," regards *World Habeas Corpus* as "a primary requirement in the national and international societies." Associate United States Supreme Court

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16. In a nine-year period, from 1946 through 1954, only 79 or 1.6 per cent of 4,849 federal habeas corpus applications were granted. *Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 84th Cong. 1st Sess. 21 (1955).*
Justice William J. Brennan, Jr., has characterized *World Habeas Corpus* as "a concrete program whereby the now only morally binding Universal Declaration of Human Rights would be made, by the voluntary consent of the nations of the world, a legally binding commitment enforceable in an International Court of Habeas Corpus which would function through appropriately accessible regional tribunals." Mr. Justice Brennan further comments:

> What is important is the obvious utility of world habeas corpus as a tool for the avoidance of the dangers of the police state, and its great promise as a contribution toward preserving and furthering world peace by repudiating, through an enforceable international rule of law, systematic and deliberate denial of human rights. The plan requires no surrender of national sovereignty to a supranational state and there is more than a feeble hope that the nations of the world would perceive that this plan would indeed serve their national interests. For as Professor Kutner has said: "If there are any denials of human rights which all nations might in principle agree violate standards of fairness, certainly arbitrary arrest, i.e., a wrongful custody without color of legal justification, is one. If individuals may be arrested or incarcerated without cause, or for causes which clearly violate fundamental human rights, they do not have the most elementary fundamental freedom."

Ambassador Arthur J. Goldberg has commented that "the idea of world wide habeas corpus, internationally recognized and enforceable in an international court, can only be applauded by those who are dedicated to the rule of law and the attainment of lasting world peace."

Chief Justice Leonard V. B. Sutton of the Colorado Supreme Court and Professor Quincy Wright have praisingly commented upon the proposal for *World Habeas Corpus*.

If *World Habeas Corpus* is to succeed it is obvious that the detained or incarcerated individual, or someone on his behalf, must be permitted to file and prosecute the petition. ... [A] good start in altering thinking along the necessary lines has been made by the creation of the European Court of Human Rights. Apparently, a second obstacle is the reluctance on the part of some nations, including the United States, to agree to any loss of individual sovereignty which is, to some extent, implicit in adhering to the jurisdiction of any international judicial body. Another serious stumbling block is that there does not appear to be at this time any way to enforce the mandates of such courts. In this connection, it has been suggested that sanctions are un-

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20. *Id.* (Emphasis added.)
necessary. Proponents of this belief cite as examples the general success of the few international tribunals which have functioned heretofore, as well as the success of international arbitral boards. They also refer to the European Common Market operations to support the proposition that signatory nations will respect and adhere to the judgments of an international judicial body. This position, while it may be overly optimistic, may be somewhat supported by the fact that there are very few recorded instances of non-compliance with the judgments of the present International Court of Justice.

History teaches us that the progress of the human race has always been one of struggle to achieve a better way of life, more perfect justice and more peaceful existence. The writ of habeas corpus has been one of the most potent weapons yet devised in man's attempt to follow paths to these fundamental and rightful goals. Mankind will somehow, some way, and hopefully very soon, use this ancient, revered and versatile remedy to serve his need for human freedom on an international basis. Surely, Regional International Courts of Habeas Corpus are within reach. Once created and obeyed, they will permit those who in good faith adhere to the precepts of the United Nations Charter, to see to it that at least in their countries there is protection against arbitrary arrest and unlawful detention. Hopefully, this safeguard can gradually be extended to all men everywhere.\(^2\)

Professor Quincy Wright (a long time mentor of Kutner) has stated:

*World Habeas Corpus*, which would provide an international remedy against arbitrary arrest and detention of individuals, *is a fundamental requirement of human justice*. Does the law of the Charter permit its realization? The Universal Declaration of Human Rights, accepted by the General Assembly without dissent in 1948, by prohibiting arbitrary arrest, detention, or exile (Article 9) and demanding a fair and public hearing by an independent and impartial tribunal on all charges (Article 10) accepts *World Habeas Corpus* in principle, and the draft Covenant of Civil and Political Rights approved by the General Assembly would convert this principle into a legal obligation of the ratifying states (Article 9). The legal problem is how to achieve general ratification of the Covenant and to establish a tribunal with adequate competence to issue and enforce a writ of Habeas Corpus all over the world. \(\ldots\) [T]he traditional concept of state sovereignty, the prevailing sentiment of nationalism, the different conditions of civil order, and the different beliefs in respect to it in the different nations, present difficulties to such achievement.\(^3\)

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The proposal for *World Habeas Corpus* was particularly revolutionary when it was first formulated in the early 1930's when the sentiments for isolationism predominated. Human rights was still regarded as a matter of essentially domestic jurisdiction and to be of no international concern, except as affecting the rights of aliens. However, certain precedents regarding the international protection of human rights had been established with the Hague Conventions on the rules of warfare, the International Labor Organization Conventions, the League of Nations Mandates System and the provisions of treaties with Central and Eastern European states protecting the rights of minorities.\(^2\) Nevertheless, the Covenant of the League of Nations did not provide for the protection of human rights, and Hitler was able to successfully claim international immunity for his brutalities by asserting the rights of national sovereignty.\(^2\)\(^5\)

The most radical aspect of *World Habeas Corpus* is in conferring rights upon the individual who is made a subject of international law. He, or somebody acting in his behalf, is to assume the initiative to activate the international judicial machinery. Traditionally, international law regards the individual as a mere object of international law with no standing before international tribunals and no means for engaging in international diplomacy. Only a state could act on his behalf within the international order.\(^2\)\(^6\) However, precedents have occurred in international practice which tend to enhance the status of the individual in the international legal order so that the proposal for *World Habeas Corpus* is no longer radical.

The Nuremberg Charter and the War Crimes Trials have made individuals personally responsible for acts which they have committed which offend the conscience of international order. A corollary to individual responsibility should inevitably be the assertion of individual rights. Another factor is the growing concern of the common man with the advent of the welfare state. The welfare of the common man has become a major concern of international policies as expressed politically and ideologically in the international covenants of human rights. International machinery for economic and social welfare has been established, including the International Labor Organization, the Food and Agriculture Organization, and the World Health Organization.\(^2\)\(^7\)

The United Nations Charter, unlike the Covenant of the League of Nations, specifically provides for the international protection of human rights as expressed in the Preamble, reaffirming faith "in fundamental

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\(^{25}\) Id.


\(^{27}\) W. Friedmann, *The Changing Structure of International Law* 217 (1964) [hereinafter cited as Friedmann].
human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small." Article 1, paragraph 3, declares that one of the purposes of the United Nations is to achieve "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights for all without distinction as to race, sex, language and religion." Article 55, paragraph (c) lists the promotion of "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" as one of the basic functions of the United Nations. This, when coupled with Article 56, which states that "all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55(a)," has led text writers to conclude that member states are obliged to protect the fundamental rights of their subjects.28 Article 2, paragraph 7, which precludes the United Nations from interfering in matters which are "essentially within the domestic jurisdiction of any state," has not prevented the United Nations and the international community from taking action to protect human rights. A growing recognition has developed that the protection of human rights and fundamental freedoms is directly related to the promotion of world peace and that the denial of human rights is a threat to peace.29

The meaning of "fundamental rights and human freedoms" has been elaborated by the Universal Declaration of Human Rights. Though the Declaration may not originally have been intended to have binding effect, its unanimous adoption by the General Assembly, its invocation in subsequent General Assembly resolutions, and its incorporation in the constitutions of many states have made it a part of customary international law.30 Article 9 of the Declaration provides that "no one shall be subject to arbitrary arrest, detention or exile;" while Article 3 provides that "everyone has the right to life, liberty and security of person." The Human Rights Commission of the United Nations has adopted a Covenant setting forth international standards for a fair trial.31 Clearly, international law provides that the rights of the individual should be protected from police-state-like actions. Within this context World Habeas Corpus emerges as a concrete remedy. When rights are recognized, it is axiomatic that a remedy be recognized.

30. GARDNER, IN PURSUIT OF WORLD ORDER 241-42 (1965).
31. This is discussed in Harris, The Right to a Fair Trial in Criminal Proceedings as a Human Right, 16 INT’L & COMP. L.Q. 352 (1967), who also points out that standards for a fair trial are also expressed in the European Convention on Human Rights and the Declaration on the Rights of Man of the Organization of American States.
The individual's status in international law has been further enhanced with the emergence of new subjects. Since World War I, international organizations have been recognized to have a special status which was affirmed by an Advisory Opinion of the International Court in the Bernadotte Case.\(^{32}\) Legal personality has been specifically conferred upon the specialized agencies by their respective charters. Many other functional and regional organizations have been recognized to have international personality.\(^{33}\) Corporations have been recognized to have a certain international status when created subject to international treaties or conventions, such as Eurofirma and Eurochemic.\(^{34}\)

Precedents granting rights to individuals to sue another state directly include the Mixed Arbitral Tribunals established between each allied state and Germany by the Versailles Treaty, the Advisory Opinion of the Permanent Court of Justice concerning the jurisdiction of the courts of Danzig,\(^{35}\) and the German-Polish Upper Silesia Convention which established an Arbitral Tribunal entrusted with the duty of settling private disputes.\(^{36}\) Another significant development of international practice has been the European Convention on European Rights which established a Commission to which alleged violations may be reported by a member state or by individuals and which functions as a quasi-judicial body in handling these disputes and a European Court of Human Rights before which either member states or the Commission may bring cases concerning the application of the Convention.\(^{37}\)

Clearly, the growing tendency towards transnational contact between individuals and groups in a world which is becoming more tightly linked has led to an enhancement of the individual in the international legal order. However, the individual's position as a subject of international law is dependent on the treaties and conventions entered by nation states. Likewise, the proposal for *World Habeas Corpus* would enhance the position of the individual by a treaty-statute conforming to an evolutionary state practice.

Kutner attempted to have the phrase *World Habeas Corpus* incorporated into the United Nations Charter at the San Francisco Conference. Eleanor Roosevelt and Senator Warren Austin claimed the matter was discussed, but the Soviet delegation had opposed this inclusion. Later, however, Kutner recalls, Andrei Vishinsky, who had participated in the drafting of the Charter, asserted that he approved of the concept of *World Habeas Corpus* but because of his position observed it was

\(^{33}\) FRIEDMANN, *supra* note 27 at 217.
\(^{34}\) FRIEDMANN, *id.* at 14.
\(^{35}\) FRIEDMANN, *id.* at 239.
"politically inexpedient." Whether the idea would have been acceptable to the United States Senate at that time (1945) is also questionable.

Kutner, however, attempted to invoke the Writ of Habeas Corpus through existing international institutions. He tested this approach in three instances involving the detentions of Joseph Cardinal Mindszenty, William N. Oatis and Moise Tshombe.

Joseph Cardinal Mindszenty had been arrested by Hungarian authorities, held incommunicado, denied the right to perform the functions of his Church and was subjected to interrogations which led to a confession of various crimes. He was sentenced to life imprisonment by the Peoples Court of Hungary on seven charges which included disloyalty, sedition and certain currency offenses. The arrest, detention and sentence were regarded as an attack upon the Catholic Church in Hungary and became a focal point for world-wide condemnation. Diplomatic and other protests proved unavailing. Kutner, even though not a Catholic, was consulted by prominent Church leaders as to possible legal action. He conceived of a petition for a Writ of *World Habeas Corpus* before the United Nations as the only possible remedy. Though Hungary at the time was not a signatory of the United Nations Charter, Article 2 of the Treaty of Peace of September 15, 1947, obligated her to take all measures necessary to secure to all persons the enjoyment of human rights and fundamental freedoms, including the right to religious freedom. The proper forum for hearing the case was the General Assembly, many of whose members had received guarantees from the Hungarian Government and who thus had an interest in the matter. Kutner prepared a memorandum which was widely circulated. Church leaders hesitated to proceed, feeling that a petition to the United Nations should be made only if there was assurance it would indeed result in the Cardinal's freedom and that hostility by other religions would defeat the action. The idea was timidly shelved.

The efficacy of *World Habeas Corpus* was first tested with the petition for the release of William N. Oatis from detention by Czechoslovakia. Oatis, an Associated Press newsman, was arrested by Czech authorities in 1951 at his apartment in the early hours of the morning without a warrant, without being informed of the nature of the charges against him, and within one week after his permit to remain in Czechoslovakia as an accredited newsman had been renewed. His arrest had not become known for 72 hours, and he was denied counsel. The American Embassy in Prague was denied permission to contact him. Oatis was brought to trial on purported charges of having engaged in activities hostile to the state, gathering and disseminating information considered secret by Czechoslovakia, and spreading malicious information regarding the Czech states through illegal news organs for which purpose he

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38. This case is discussed in *World Habeas Corpus*, supra note 9, at 99-102.
39. *Id.* at 102-109. The text of the Petition is at 244.
misused Czech authorities. From the time he was taken into custody until the time of his trial he was denied permission to speak, consult or contact any American official to prepare for trial. He was subjected to repeated interrogations to extort a confession, conforming to the then prevailing pattern of Communist trials. At the trial a five-man court assigned counsel to represent him who, in fact, prosecuted the defendant after he was induced to plead guilty. No diplomatic observers were permitted at the trial. A period of a year of diplomatic negotiations proved unsuccessful.

In May 1952, Kutner addressed, through Eleanor Roosevelt, a petition for a Writ of World Habeas Corpus to the United Nations Economic and Social Council which was accompanied by a petition to the General Assembly, including a request that the United States join as a party-movant. The Human Rights Commission advised that the request that the United States join as a party-movant was granted and that the petition was filed with copies served upon the respondent Czechoslovakia. The State Department took no action to reject the proposal, though Dean Acheson, the then Secretary of State, doubted its "workability." However, a number of international law scholars, including Quincy Wright and Hans Kelsen, found a basis for the action under Article 56, which requires all members to take joint and separate action in cooperation with the Organization for the achievement of the purposes in Article 55, which includes universal respect for and observance of human rights and fundamental freedoms. The State Department took no action to dissociate itself from the petition and the documents presented, though it did not act to press the petition.

The petition alleged the facts surrounding the arrest, detention and trial of Oatis with the proceedings characterized as "a shabby conviction and a sham or pretense of a legal trial and a denial of liberty and international justice." Jurisdiction of the General Assembly was claimed in that "under the Charter and the Declaration of Human Rights any person on earth, and particularly a citizen of a nation subscribing to the UN Charter, has the right, either individually, or in association with others, to petition (or by other process to communicate with) the authorities of the United Nations to remedy a wrong committed by another nation that deprives him of his liberty or human rights." The United Nations is claimed to have a special responsibility to implement human rights and that all signatory states assume the legal and moral obligation to guarantee citizens of all nations found within their national borders their rights "to life, liberty and property, equality before the law, immunity from torture and inhuman punishment, presumption of innocence,

40. The Czech regime at this time had also conducted a purge trial of prominent Communist leaders, such as Rudolph Slansky, who were induced to confess. Recently, however, the Czech government has admitted that these individuals were wrongfully convicted and sentenced to death. Chicago Tribune, Feb. 18, 1968, Sec. 1A, at 1.
a fair and open trial, the right and choice of counsel, no *ex post facto* laws, freedom of speech, freedom of religion, and the freedom of assembly.” The petition alleged that “the General Assembly has the inherent power to create the methods, vehicles or organs to carry out the objects and purposes of the United Nations by virtue of the Charter and the Declaration of Human Rights.”

The petition then quotes extensively from the Charter regarding human rights and sets out the Universal Declaration of Human Rights.

As Alternative Jurisdiction, the Oatis petition alleges:

The General Assembly makes policies and is the parliament of the world. It has the responsibility of recommending United Nations action at any time to execute its purpose to build a better world for all peoples and especially to preserve and protect human rights.

The General Assembly has the inherent power under the provision of the Charter to initiate appropriate measures to restrain and rectify threats and deprivations of human rights to each and every individual on the face of the globe.

The General Assembly has the power and jurisdiction to affirm the basic principles of international law as they have existed for more than 6,000 years and as a tribunal create its own power and procedures to enforce preservation of fundamental human rights.

The General Assembly is the sole judge of its own competence in its assumption of jurisdictional responsibility to enforce separate and collective human rights under the Charter.

As Correlative Jurisdiction, reference is made to the International Court of Justice and to Articles 104 and 105 of the Charter referring to the legal capacity and privileges and immunities enjoyed by the United Nations as an international organization in the territories of the member states.

The petition then makes a series of contentions regarding Oatis’ trial, alleging that Czechoslovakia, by violating the concept of human rights which it is obligated to protect and to preserve, violated “the international concept of due process principle” in denying Oatis a fair trial and also violated another concept of due process known to international law, “the failure to observe that fundamental fairness essential to the very concept of justice.” The petition alleges that Oatis was denied due process of law as guaranteed by the Charter and the Declaration on Human Rights and “that the respondent signatory Czechoslovakia be denied the right to indulge in any technical jurisdictional arguments in restraint of liberty.” Habeas Corpus is asserted to be the only remedy available for seeking relief.

The petition then concludes with an impassioned argument for
issuing the Writ of World Habeas Corpus, alleging that the remedy lies within the fabric and jurisdictional scope of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Court of Justice, and the Security Council and that "guilty signatories to the United Nations Charter can be bound by any ruling through the competent tribunal." Reference is made to the use of the Writ of Habeas Corpus as a sword and shield to protect individual liberty as derived from the Magna Carta, with the United Nations Charter characterized as a "Magna Carta of the world family of nations" and "constitution of world interdependence" and, being cosmopolitical in nature, requires a "cosmojudicial writ for all humans on the globe." Kutner argues further that his petition for the United Nations Writ of Habeas Corpus is the first of its kind under the Charter, and the first in legal history, and that, under the basic law of habeas corpus, can be filed by anyone. The petition argues that the General Assembly may by resolution order Czechoslovakia to show cause and by what legal rights Oatis was being detained and then refer the matter to an appropriate organ or the International Court for an advisory opinion while requesting the Human Rights Commission to gather the relevant facts. The petition argues that the Court should issue the writ commanding Czechoslovakia to produce Oatis in open court and submit to the testing of the legality of his detention and to proceed ex parte if Czechoslovakia refuses to comply.

As precedent, Kutner’s petition refers to the nonrestrictive basis of interpretation of the International Court’s advisory opinions in the Tunis, Morocco cases and its conducting of hearings into the treatment of Indians in the Union of South Africa, action in the Indonesian question, the Palestine question, “and others.” Reference is made to the procedure of the Anglo-Iranian controversy. As further authority, Article 10 of the tentative draft Covenant of Human Rights is cited as indicative of procedures for the right of a fair trial. The argument is made that a precedent could be established by issuing a writ of World Habeas Corpus in behalf of Oatis.

Members of Congress considered it significant that the Human Rights Commission did entertain the petition and did not dismiss it summarily. The matter languished for a year in the Human Rights Commission. Then the delegation of the Dominican Republic, headed by Rafael Trujillo, proposed placing a resolution before an appropriate (political action) committee of the United Nations in which it would have intervened as a party-movant requesting an advisory opinion from the International Court of Justice as to the appropriateness of the petition with Human Rights Commission prosecuting the case and proposing that the United Nations adopt World Habeas Corpus as a definitive legal procedure to implement the human rights provisions of the Charter.

42. World Habeas Corpus, supra note 9, at 104.
and the Declaration. The State Department requested a thirty-day delay, and Oatis was dramatically released in the interim.

Obviously, the extent to which Kutner's activities was a factor in obtaining Oatis' freedom was immediately acclaimed. Congressman John Beamer of Indiana contended that the pressures mounted for a United Nations Writ of World Habeas Corpus in keeping the case before the "conscience of mankind" greatly contributed to the release in that Czechoslovakia did not want to face a showdown. Though Kutner observed that "it is not unrealistic to contend that but for these pressures, Oatis would still be held in prison," other factors may have also played a part. Stalin had died; a thaw had developed behind the Iron Curtain; and the release of Oatis was a means for reducing international tension. Kutner notes that to have pursued the matter through the United Nations would have taken five years of legal maneuvering.

The arguments presented in the petition might have been subject to challenge. To characterize the General Assembly as a world parliament was bold and challenging. It is composed of plenipotentiaries of sovereign states, functioning as an instrument of international diplomacy. General Assembly resolutions, under the Charter, are not binding upon the members, having only the effect of recommendations. However, where the Assembly solemnly adopts a declaration by virtually unanimous vote, the result may, on occasion, be an expression of a norm of international law. This does not mean, however, that the Assembly legislates. Such a norm was asserted with the adoption of the Universal Declaration of Human Rights which has become of binding effect subsequent to its adoption, though its legal delineations may have been unclear at the time Kutner had filed his Oatis petition.

Notwithstanding serious doubt as to whether the International Court would have assumed jurisdiction to hear the matter, Kutner cut through the curtain of archaic historicity. The Court will historically refrain from hearing a matter unless both parties accede to its jurisdiction, so that without the participation of Czechoslovakia, the Court would refuse to hear the matter ex parte. Moreover, in view of the decision in the Southwest Africa case, only the United States, as a party-movant, would have standing to bring the matter before the Court, alleging that an injury was perpetrated upon one of its nationals. The dissenting opinion of Justice Tanaka (a vigorous supporter of World Habeas Corpus) in the Southwest Africa case tends to support Kutner's position in arguing that a matter involving the protection of human rights and fundamental freedoms is an established international law norm affecting

44. See generally Gross, Bulgaria Invokes the Connally Amendment, 56 Am. J. Int'l L. 357 (1962).
46. Id. at 250.
the interests of all subjects. But this is not yet the legally institutionalized prevailing position. Though the General Assembly could have asked the International Court for an advisory opinion as to the efficacy of using habeas corpus or analogous procedures, this would not have determined the legality of Oatis' detention and would not have binding effect.

Conceivably, the General Assembly of the United Nations or the Human Rights Commission could form an ad hoc tribunal to hear the matter and reach a decision. Such a tribunal might even act *ex parte* if Czechoslovakia should refuse to participate. But such a determination could only be enforced by Security Council action which would very likely be blocked by a Soviet veto. Nevertheless, a determination by an impartial tribunal may have a moral effect.

The American State Department, which was eager to obtain Oatis' release, would, of course, not be inclined to oppose Kutner's efforts, nor would it be inclined to dissociate itself from any initiative. However, Kutner's petition would have had greater significance if the State Department had overcome its traditional indecision and had actively joined as a party-movant. The fact that the Human Rights Commission did not dismiss the petition and was willing to consider it is of significance in permitting at least some access by individuals to an international body. Perhaps of most significance is that the petition is a dramatic illustration of the ability of private citizens to focus the attention of international institutions upon the perpetration of a wrongful act by a sovereign state.

Kutner has again had occasion to file a petition for *World Habeas Corpus* before the United Nations in the case of Moise Tshombe. Tshombe had been a controversial figure as head of the secessionist province of Katanga and then as Premier of the Congo. Following a *coup* led by Joseph D. Mobutu, he fled into exile, receiving asylum in Spain. While Tshombe was in exile, the Mobutu regime tried him *in absentia* for high treason and for the murder of former Congolese ruler Patrice Lumumba. Tshombe was called upon to return for the trial but feared to leave his exile. He was convicted and sentenced to be executed. Tshombe, while enjoying asylum in Spain, boarded a British chartered plane for a flight to the Spanish island of Majorca. During a stopover, certain individuals boarded the plane and hijacked it to Algeria where Tshombe was arrested and detained. Though the Congo did not have diplomatic relations nor any treaty with Algeria, it sought his extradition. The Supreme Court of Algeria found that Tshombe could be extradited. Kutner, on behalf of Tshombe's wife, Madame Ruth Tshombe, filed a petition for Writ of *World Habeas Corpus* with Algeria, the Congo, Spain and the United Kingdom designated as respondents. Algeria was called upon to discharge Tshombe from his arbitrary and illegal detention and from his being subjected to extradition; Spain was to assert its sovereign right of enforcing its granting of political asylum; and the United Kingdom was to protect
ADVOCATE AS LAWMAKER

him in the piracy of their overseas plane, chartered under British law and
guaranteeing him passage without unlawful interference by any other
sovereign state.\textsuperscript{47}

The petition alleges the facts surrounding Tshombe's kidnapping,
arrest and detention and "that the arbitrary arrest, kidnapping, and
detention in Algiers, Algeria, was the deliberate and planned act of the
respondent, the Congo, and pursuant to a conspiracy to deprive the
said Moise Tshombe of his human rights to be free from arbitrary arrest,
detention, and exile as guaranteed to him under the Articles of the
Universal Declaration of Human Rights. . . ." All the facts leading up to
the detention are stated with allegations that no defense counsel was
allowed at Tshombe's trial in the Congo, which was conducted with no
defense witnesses, without competent evidence and no record kept. The
trial was held in two sessions at eight-day intervals. As in the Oatis
petition, the Jurisdiction of the General Assembly is alleged by reference
to Charter provisions and the Universal Declaration of Human Rights.
The Corollative Jurisdiction of the International Court of Justice is also
alleged.

The petition also alleges that Algeria did not have jurisdiction to try
Tshombe, as none of the alleged crimes was committed within its jurisdic-
tion, nor did it have jurisdiction to extradite him to the Congo as he was
not legally brought or found within its jurisdiction and that Algeria, in
seeking to extradite him, is acting contrary to international custom and
practice. The petition further asserts that Tshombe did not engage in
any activities hostile to the state which may be classified as treason nor
engage in any acts contrary to the interests of the Congo, and that to have
the punishment of death run concurrently with alleged crimes is "to
make the demand for extradition a sham, pretense and a farce; and the
extradition ordered by the Algerian Supreme Court was a transparent
comity arrangement and the compounding of international abduction."
The petition alleges that "it is a general rule of international law that
convictions \textit{par contumace} (i.e., sentences imposed \textit{in absentia}), are
treated as a nullity from the point of view of proceedings of extradition,"
and that in such cases "conclusive evidence of guilt has to be produced
before a surrender can be made." The trial and conviction of Tshombe
are characterized as "a transparent device" by Mobutu to tighten his
reins of dictatorship and to delude the United Nations, and that the
charges were without credence in fact or fiction, but simply the ir-
responsible accusations of Mobutu.

The Petition alleges that Algeria and the Congo violated the concept
of human rights and international due process in that Tshombe was
denied a fair trial. The extradition proceedings in Algeria are alleged to
be a nullity in that there was no extradition treaty with the Congo and

that, because Tshombe was denied the protection of international due process, the extradition proceedings were void. The only available remedy is alleged to be the Writ of *World Habeas Corpus*.

The allegations are buttressed by extensive scholarly argument supporting contentions that a trial *in absentia* cannot support a conviction; that the right to a fair trial is a recognized human right guaranteed by international law; that Algeria would not be acting in accord with international legal principles if it extradited Tshombe to the Congo and thereby aided and abetted in the kidnapping and had not followed any procedures for determining the validity of the charges against him; that Spain, after granting him asylum, was obliged to assure his protection and that this protection extended to a plane on the high seas en route from Majorca to the Spanish mainland with the right of asylum protected in international law by the Universal Declaration of Human Rights and covenants, as well as by treaties affecting the rights of refugees; and that the United Kingdom may also assert jurisdiction because the plane was chartered under its laws. The argument then concludes with extensive quotations as to the efficacy of the Writ of *World Habeas Corpus*.

The petition prays that the Human Rights Commission create an Ad Hoc Committee Tribunal to accept the petition for the Writ of *World Habeas Corpus* to inquire into the matter of Tshombe's detention and imprisonment in Algeria, his trial and conviction in the Congo, the deprivation of political asylum in Spain, and the deprivation of the sovereignty of the United Kingdom by the air piracy kidnapping of the British plane. The petition further prays that the Commission forthwith issue a United Nations Writ of *World Habeas Corpus* requiring Algeria to show cause why the General Assembly should not order it to free Tshombe.

Kutner, in the course of filing the petition, cabled President Boumedienne to defer Tshombe's extradition pending a United Nations determination of the matter and contacted State Department and United Nations personnel along with representatives of the nations involved. The Human Rights Commission accepted the petition, but has not yet held a hearing. Though Kutner encountered some sympathetic response, neither Spain nor the United Kingdom nor any other state has officially intervened in the matter to press Tshombe's cause. According to Kutner, the Algerian Mission to the United Nations has indicated to him that the Algerian government is seeking a legal excuse to release Tshombe and

48. Professor William W. Bishop doubts whether a state is required today under customary international law to accord the right of political asylum. [Letter to Kutner, August 3, 1967]. But a different position supporting Kutner, is taken by Weis. [*Territorial Asylum*, 6 *Indian L.J*. 173 (1966).] Generally, however, a state may not arbitrarily expel an alien. [*O'Connell, International Law* 769 (1963).] However, perhaps as a result of the Tshombe case, the United Nations adopted a resolution affirming the right to territorial asylum. [*Declaration of Territorial Asylum*, U.N. Doc. 2313 (XII) A/RES/2313 (XXII), December 19, 1967.]
that the petition provides it. The Algerian government has released the plane, and Boumedienne has announced that Tshombe will not be extradited. As of this writing, however, he still remains in detention. Kutner believes his release is imminent.

There have been reports that, at one point, Boumedienne offered to extradite Tshombe to the Congo in return for that country’s severing of its relations and contacts with Israel and aligning with Algeria’s militant nationalist foreign policies; but Mobutu refused to agree, since he is dependent upon United States and Israeli assistance. There were also charges that the kidnapping was perpetrated by agents of the Central Intelligence Agency, an allegation which Kutner claims lacks any substance and is sheer nonsense.

Other reports assert that Tshombe was plotting a return to the Congo and the overthrow of the Congo regime at the time of his kidnapping. If this were true, he may have compromised his right to asylum in Spain. But Kutner steadfastly denies these contentions. There has also been publicized evidence, acknowledged by Kutner, that the kidnappers had in fact been conspiring with Algerian authorities in arranging the kidnapping. Some reports indicate that Mobutu is not eager to have Tshombe return alive, as his presence might trigger an uprising in parts of the Congo. The story is yet to unfold.

The Tshombe case represents a shocking disregard for international legal principles. An individual, enjoying granted political asylum is, while engaged in an international flight, suddenly seized and the plane is hijacked. He is taken to another country (wherein he has never committed any criminal act) and imprisoned. To permit this action to stand without protest by the international community would mean that no person anywhere could be secure from kidnapping and other acts against the person by agents of another state. The international legal order has fallen upon a sorrowful state when protest may only be asserted by the initiative of a private individual while the traditional subjects of international law stand mute. The petition has had the effect of focusing the attention of international institutions upon what may be regarded as an outrage to principles of international law.

In 1958, Representative John V. Beamer of Indiana introduced a resolution proposing that the United States sponsor a multilateral treaty creating an international tribunal as a forum for the assertion of a prima facie case that an individual is being unlawfully detained by governmental authorities and that the detention violates fundamental human rights. The tribunal would be authorized to issue a Writ of Habeas Corpus. Representatives of the State Department, in a letter to the House

52. Id.
Committee on Foreign Affairs, expressed opposition. The objections raised were that such a court was not practical, as there would not be an enforcement system for compliance to its directives; that the proposed tribunal would require an agreed code of international law which does not exist at present; that with the many deep-seated political and ideological differences, it would not be “practical” to seek agreement on a statute for such a court; and that “it is the settled policy of the Administration to favor methods other than treaties to encourage the international promotion of human rights and individual freedoms.”

Kutner replied to these arguments by contending that international tribunals have traditionally secured compliance with their decisions without the aid of specific enforcement procedures other than court decrees, and that it would be unnecessary for the parties to the treaty to formulate a legislative type code of law on arbitrary arrest and confinement, since general obligations regarding individual rights may be derived from procedures of mixed arbitral boards, as in the cases of the rights of aliens, the bills of rights of constitutions and municipal interpretation and the development of human rights principles by the United Nations through the Universal Declaration of Human Rights establishing general standards of due process. Kutner further contends, in replying to the State Department position, that there are many nations who would agree to the proposal, and that no nation state which already provides safeguards against arbitrary arrest should not logically oppose an international guarantee. Finally, answering the State Department position of opposing the promotion of human rights through treaties, Kutner contends that respect for human rights can be molded only through legal enforcement as embodied in World Habeas Corpus and that the United States, as a “Big Power,” is obliged to take the initiative.

Today the State Department position has been modified somewhat in that three treaties involving human rights have been submitted to the Senate for ratification: an amendment to an earlier treaty outlawing slavery, a treaty dealing with the rights of women, and a treaty outlawing forced labor. These treaties were submitted because their adoption would not involve constitutional questions. But only the first has been ratified. Whether the Administration would now be inclined to support a proposal for World Habeas Corpus is somewhat problematical, though Ambassador Goldberg’s support is indeed encouraging. Some study may be needed as to whether American participation in a proposal for World Habeas Corpus would accord with the Constitution regarding federal-state relations. Inasmuch as the statute would be an overlay to the federal habeas corpus, no constitutional conflict would be likely to arise.

54. The text of the State Department position is found in World Habeas Corpus, supra note 9, at 154-55.
A deplorable obstacle to American acceptance of a proposal for
World Habeas Corpus is the anachronistic outlook of some senators and
elected opinion-makers who still regard the protection of human rights
as a domestic or internal matter and not of concern to international
law or diplomacy and who have opposed the ratification of treaties on
this subject. 56

Professor McDougal has commented:

It was appropriately urged by the late Judge Hersch Lauterpacht
that until "an effective right of petition—which means a
right of petition with the right to have it investigated with the
view to such action being taken upon it as is necessary—is
granted to individuals concerned or to bodies acting on their
behalf, any international remedy that may be provided will be
deficient in its vital aspect." 66 For the larger community of
mankind genuinely aspiring toward improved implementation
of human rights the proposal for internationalizing habeas
corpus would appear to offer plausible hope for remedying the
greatest defect in its present armory of institutional practices.
Certainly the United States could have nothing to lose, save its
reputation for indifference to the human program, by vigorous
and positive action in exploration and promotion of the poten-
tialities that inhere in the [World] habeas corpus proposal. 67

Kutner has continued to express himself on various aspects of World
Habeas Corpus. In an address to the International Bar Association Con-
ference in Mexico City in 1964, representing the American Bar Associa-
tion, he suggested the use of World Habeas Corpus in maintaining inter-
national standards with regard to the extradition of individuals. 68 He has
also indicated how World Habeas Corpus may be applied to protect the
right to privacy and the family relationship. 68 World Habeas Corpus
could be used to determine the right to child custody and to assure
freedom of movement from one nation to another of members of the
family unit. World Habeas Corpus may be adapted, as suggested by
Kutner, to another area of international law, the protection of prisoners
of war with the establishment of special tribunals to hear complaints,
through the invocation of Writs of World Habeas Corpus, of violations
of the Geneva Conventions. 69

Kutner has suggested the adaptation of remedies analogous to World

57. M. McDougal, International Habeas Corpus: A Practicable Measure for Human
Rights (unpubl. paper).
(1964).
59. Kutner, Due Process of Family Privacy: World Civil Liberty and World Habeas
60. Kutner, 'International' Due Process for Prisoners of War: The Need for a Special
Habeas Corpus, such as Habeas Proprietatem, as a means for obtaining compensation through an international tribunal of seized foreign property. He has also formulated a scheme for the protection of individual rights to the use of the sea and sea floor through a writ of Habeas Marinus which would allow recourse to an international tribunal when such rights are infringed upon. Habeas Marinus would be particularly applicable to the exploitation of the resources underneath the sea, including the sea floor, in inner space. Kutner has also proposed the establishment of an International Cosmos Court to regulate the use of outer space.

His main focus, however, has been upon the proposal for World Habeas Corpus to which he has dedicated himself with religious and evangelistic fervor. Kutner reaffirms that “World Habeas Corpus is . . . on the threshold of becoming an accomplished fact, a long-time movement, a tenacious dream, that has a good chance of coming true.”

II. THE PROPOSAL FOR AN INTERNATIONAL WAR CRIMES TRIBUNAL

To Kutner, the international community has degenerated to atavism, as characterized by the conflict in Viet Nam and, recently, by the Arab-Israeli war, in which the Arab states had proclaimed the political annihilation of Israel and the genocide of its people as their goal. Particularly appalling were the cynical policies of the big powers in the Middle East. The acts of genocide by the Chinese in Tibet and of Nigeria in Biafra are also indicative of an atavistic trend. Kutner believes that the establishment of an international war crimes tribunal is needed for the impartial adjudication of such international outrages. The precedent is to be found in the Nuremberg Trials following World War II. Kutner envisions such a court as holding both states and individuals responsible for actions which may constitute war crimes under the criteria of the Nuremberg Charter, the United Nations Charter, the Genocide Convention, and other international conventions, declarations and treaties. It would provide a means for impartial adjudication of such international actions as the American intervention in Viet Nam. The effect would be to focus the spotlight of world public opinion upon the condemnation of actions constituting war crimes. Persecuted groups would have access to an international body for a hearing.

64. L. Kutner, I, The Lawyer 105 (1966).
The proposal has its antecedents in a draft treaty of the International Law Commission in the early 1950's. One objection that has been raised is the absence of a jury. However, international standards have recognized that a fair trial may be held without a jury.

Another problem is to develop criteria for determining criminal responsibility. If responsibility is to extend beyond the heads of state, and superior orders is not to be a defense, then could acquiescence in the perpetration of a criminal act, or inaction to stop the action, be regarded as criminal? For example, if Nazis, who obeyed orders in torturing and killing concentration camp inmates are to be held responsible, what about the American leaders who were indifferent or hindered efforts to save Europe's Jews? Should they be indicted for a criminal act? Similarly, where is responsibility to be assessed in Viet Nam? Atrocities have been committed by both sides. Are the heads of state of both North Viet Nam and South Viet Nam responsible, along with the leaders of the American administration? Is the Russian Government and the Chinese Communist Regime also responsible?

Kutner is aware that compelling though fictitious argument against the proposal is that it may make negotiation, and the reconciliation of international conflicts, more difficult. When one side to a conflict is branded a criminal, it becomes more difficult to deal with. But the substantive value of the proposal is not impaired. American foreign policy, particularly, has tended to be moralistic as distinguished from moral. Thus, to some Americans any negotiation or compromise with an adversary labeled "evil" is denounced, such as negotiation with the Soviet Union, or to attempt a compromise solution in Viet Nam is conceived to be appeasement. Similarly, contacts with the Chinese Communist Regime are to be abhorred.

The international situation as a whole in a total context must be considered in dealing with other nations. Though there may be evil in Communist domination of the nations of Eastern Europe, resort to nuclear war for their liberation would constitute a much greater evil. The demands of international diplomacy require dealings and alliances with states regardless of the nature of their government or their past acts. For example, after World War II the Franco Regime in Spain was condemned for its association with the Axis powers and the United Nations called upon all states to sever diplomatic relations with it. The Spanish Regime was little affected by such action, and, subsequently, because of the needs of the cold war, Spain was permitted to return as

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a respected member of the family of nations and is now a member of the United Nations. 69

Kutner suggests sanctions flowing from a treaty-statute to overcome the problem of the enforcement of a War Crimes Court decree. Such a decree would differ from that of any other international tribunal in branding a state or an individual. Therefore, voluntary compliance is unlikely to be forthcoming. Though the force of public opinion may be a factor, it is of limited effect. The widespread condemnation of the suppression of the Hungarian Revolution was of little effect upon either the Soviet Union or the Kador Regimes which are fully accepted within the family of nations enjoying full diplomatic relations with the United States. Another case has been the United Nations' condemnation of Apartheid policies in the Union of South Africa and its policies with respect to Southwest Africa. This has had little effect in causing South Africa to change its policies, while overriding security and economic considerations have compelled members of the international community to continue their dealings with South Africa. The international condemnation of a nation may even have an opposite effect from that which was intended in actually strengthening the regime in power. The citizens of the nation may feel that their national pride has been challenged and rally to its defense, as was the case in Spain.

The imposition of meaningful economic, fiscal, technical aid, refugee and UNESCO sanctions, assuming that it would be possible to get around or overcome the problem of a big power veto in the Security Council, would no longer be effective, as demonstrated by the League of Nations' experience in imposing sanctions upon Italy after it had invaded Ethiopia in the 1930's and the current boycott of Rhodesia. To use military force may also be unwise with the absence of an international police force. Moreover, where a big power is involved, as was the case in Hungary, such military intervention may ignite a wider war or further inflame the conflict, thereby causing an even greater evil.

Clearly, the proposal for an International War Crimes Tribunal is not a venture into futility. Kutner is willing to seek first the institution of a radical change in the international order. Such a tribunal would be effective in a world order where war itself as an instrument of international policy was abolished through a scheme for total and complete disarmament to be achieved through international agreement or by unilateral initiatives. The sovereignty of the nation state would then be subordinated to an overriding world authority. This is what Kutner envisions, and he is as explicit as one could be in the light of the mediocrity of international decision-makers.

Kutner's proposal for a War Crimes Tribunal, like his proposal for World Habeas Corpus, is in the American tradition of perceiving an evil and seeking a legal solution to resolve it. It is a part of the American heri-

69. See generally CROZIER, GENERALISSIMO FRANCO (1968).
Advocate as lawmaker

...tage to conceive plans for world order—to strive for the desirable—regardless of international realities. Kutner is very much a part of that tradition. Opposed to this outlook are self-styled, hard-headed realists who conceive of international relations essentially in terms of achieving objectives through the exercise of power politics. They dismiss the schemes of the idealists out of hand as visionary, as demonstrated by the State Department reaction to the proposal for World Habeas Corpus. Occasionally, an idealist will find reason to despair and to resign himself to cynicism. The writer recalls a meeting he had with a noted jurist who, after encountering such frustration in representing his country on the Human Rights Commission that he lost all hope for achieving world order and has now focused his scholarly attention on ancient and medieval history.

Both the idealist and the realist perform a valuable service. In a world of universal interdependence and the overhanging threat of thermonuclear annihilation, a radical alteration of the international order has become imperative. The suggestions of visionaries like Luis Kutner are needed in an attempt to devise means for implementing international change. To accept totally the outlook of the realists is to become resigned to a Hobbesian jungle of war of one against all. Nevertheless the realist is needed to provide critical reflection to the visions of the idealists. Both the realist and the idealist have important roles to play.

III. Kutner the Reformer

Aside from concern about improving international institutions, Kutner has also focused his attention on matters of domestic legal reform, particularly in the areas of mental health, charitable trusts, victims of crime, industrial relations, and the publicity of criminal proceedings. His contributions to these areas of law will be discussed briefly.

A. Mental Health—Commitment Proceedings

Kutner’s concern with the rights of persons who are involuntarily committed to mental hospitals was first manifested in his efforts to obtain the release of the noted American poet, Ezra Pound, from Saint Elizabeth’s Hospital where he had been committed subsequent to government accusations that he had acted treasonably during World War II by broadcasting and disseminating Axis propaganda from Italy. Kutner’s interest in the case stemmed from his association with Ellen Borden Stevenson (the divorced wife of Adlai Stevenson, who had been associated with writers and artists) and his friendship with Ernest Hemingway. Kutner recommended and also contacted Thurman Arnold and Abe Fortas, who initiated a petition for a Writ of Habeas Corpus to obtain Pound’s release.

Kutner continued to manifest concern for the protection of the
rights of individuals who are committed to mental hospitals. An article which was published in the Northwestern Law Review in 1962 along with an exposé in the Chicago Daily News contributed to the rewriting of the Illinois Statute. The article was chosen in a collection of readings on the topic for use as a college text.\textsuperscript{71}

Kutner castigated the procedures in the United States for committing the mentally ill as "sick, obsolescent and unjust."\textsuperscript{72} These procedures were characterized as "illusions of due process."\textsuperscript{73} Though the Illinois statute provided elaborate procedures for commitment, in actual practice the statutory requirements were evaded. The Illinois system then provided that for an individual to be committed a petition be signed by a friend or relative of the alleged mentally ill, stating that the petitioner knows the person for whom confinement is sought and believes him to be mentally ill; an examination by one or more court-appointed doctors who will prepare diagnosis and submit it to the court; and a court hearing at which the alleged mentally ill is entitled to demand a jury. However, in practice, as undertaken by the Cook County Mental Health Clinic, the physician's certificates were signed as a matter of course by staff physicians with little or no examination and after the alleged mentally ill had already been brought in for confinement. The same staff doctor was later appointed to handle the examination for the court. Examinations were conducted on an assembly-line basis, often taking only a few minutes. At the court hearings the patients were kept under heavy sedation and were often stuporous. The clinic followed the practice of not informing patients of their right to counsel. This is a problem not peculiar to Illinois.

Kutner noted that, while the legal profession is concerned with procedures to protect individuals from being "railroaded" to mental institutions, the medical profession is rightly concerned that excessive legal formality may do harm to the patient. The problem involves both medicine and law. Kutner would agree with the medical profession in eliminating the use of jury trials, whether mandatory or optional, from commitment proceedings. He would also eliminate the trappings of criminal proceedings by rewriting the statutes to eliminate terminology employed in criminal actions, removing the police from the commitment proceedings in all but the most violent cases, and replacing formal court hearings with informal hearings before commissions as in Britain. Involuntary commitment, to Kutner, is justifiable as part of the police power, to protect the remainder of society, and \textit{parens patriae}: care for the incompetent and protection of the individual from himself.

However, Kutner proposed that the requirement of notice be re-

\textsuperscript{71} \textit{Readings in Mental Illness and Social Systems} 89 (1966).
\textsuperscript{72} Kutner, \textit{supra} note 70, at 383.
\textsuperscript{73} \textit{Id.}
tained, despite the objections of psychiatrists. The notice requirement allows the individual to prepare and present his defense. The notice need not be formally served by a sheriff, but informally by a social worker. Kutner would permit the presence of the individual at the hearings but not require it. Thus, he clearly disagrees with the urgings of some psychiatrists that they be empowered to summarily commit individuals. He strongly opposes the practice of summary commitment with an appeal procedure. Kutner urged the adoption of uniform legislation with a minimum requirement of due process, "that every man is entitled to a fair hearing, on notice, should he be threatened with confinement."

Influenced by Kutner’s article, Illinois, and thirty-two other states have revised their commitment procedures, all in line with Kutner’s suggestions. The present Illinois statute follows the Kutner recommendations in providing for informal notice and for a hearing by a commission, though the individual may elect to have a jury hearing. The statute also provides that the individual who is confined has a right to counsel and to be informed of this right. If the proceedings do result in his commitment, he may be brought to the institution by private automobile or by a relative. Provision is also made for periodic review every sixty days as to his detention.

Since the appearance of Kutner’s article, national concern has also been expressed regarding the power of the courts, on the determination of a psychiatrist, to determine whether an individual is competent to stand trial and to achieve thereby his detention without judicial procedures. Case histories pointing to abuses in this regard have been recently highlighted in a book by the noted psychiatrist, Thomas S. Szasz, who refers to Kutner’s article. Recently, the Circuit Court of Appeals for the District of Columbia has granted a habeas corpus petition to an individual confined to a public institution after pleading innocent to a criminal charge by reason of insanity because he was not receiving adequate treatment. It is submitted that this principle should be extended to all persons who are involuntarily committed. Clearly, the concern for protecting the mentally ill’s rights should extend beyond his commitment. Moreover, he should not be subjected to surgery, electroshock therapy, insulin treatment or other radical treatment without his express consent. He should also have the right to receive visitors where this right does not conflict with his treatment. Regulations prohibiting visitation on Sundays, the only day a family member may be able to come to the state hospital, should be regarded as an arbitrary infringement of this right. In another area regarding the rights of the mentally ill,
concern has been expressed as to the constitutionality of statutes providing for the compulsory commitment of drug addicts.  

Kutner believes that a paramount question for consideration is whether individuals should be involuntarily committed. Kutner urges that a thorough study be made of the premises justifying such commitment. There may be justification, where an individual would be a threat to others, but not as to harmless individuals. Kutner resists and objects to the temptation to commit persons merely because they do not conform to the behavioral norms established by society.

B. Charitable Trusts

Kutner's interest in charitable trusts developed as a result of his involvement as counsel for the Artists Equity of the City of Chicago in the case of the Ferguson Monument Trust, which revealed the shocking inadequacies of legal protection of charitable trusts in Illinois. Mr. Benjamin F. Ferguson, upon his death in 1905, left all of his one million dollar estate in trust to be permanently used for beautifying the City of Chicago through the erection of statuary and artistic monuments with the trust instrument designating the Northern Trust Company as trustee and the Art Institute of Chicago designated to expend the money under the direction of its Board of Trustees "in the erection and maintenance of enduring statuary monuments..." The gift was hailed at the time as a great gift to the City of Chicago in making the city beautiful. The City and its people were to be the true beneficiaries. The Art Institute channeled the fund for the erection of several monuments. But after 1929 no more statutes were erected. The Art Institute, eager to obtain funds for its own expansion, in 1933 filed a Complaint in the Circuit Court of Cook County requesting the court to construe the language of the will so that the word monument might include a building, specifically an addition to the Art Institute. The Attorney General filed an answer making only a nominal defense, and a decree was entered. The Art Institute's Complaint, the Attorney General's Answer, and the court's decree were all typed on the same typewriter, bore the same watermark, and the Attorney General's Answer was enclosed in the same reversed blue backing of the Art Institute's counsel, who was himself a member of its Board. No witnesses were heard and no transcript of any proceedings appears in the court's files. Where the Art Institute had been the administrator of the Fund, it had now become its beneficiary. Because the Art Institute decided to postpone construction of an addition until a substantial fund had accumulated, the public became aware of the loss only gradually. Several civic groups' requests for assistance in erecting new sculptures were denied in the 1930's and the 1940's.

By 1955, $1,600,000 had accumulated, and the Art Institute decided to proceed with the construction of the addition. Since the 1933 decree had sanctioned a museum building, and it had been decided to construct an office building in a slightly different location, it was deemed prudent again to obtain court affirmance. But the public was now aware of the Art Institute's scheme; and several parties, including the City of Chicago, requested the then Attorney General to enter a vigorous defense to the Art Institute's petition. However, the then Attorney General, whose relative was on the women's board of the Art Institute, publicly declined to resist the Art Institute's petition, stating that he felt himself bound by the earlier decision. After several groups' petitions to intervene were denied, the Circuit Court of Cook County decreed that, as requested by the Art Institute, the income from the Ferguson Fund could be perpetually used for the construction and maintenance of the Art Institute's administrative wing. Subsequent suits foundered on the same point. The perversion of the Ferguson Monument Fund was complete, in the writer's opinion, with the premeditated fraud given judicial sanction.

Kutner noted that the case pointed up flaws in the charitable trust statute. Illinois courts have great leeway in reconstructing the terms of a charitable trust instrument. The courts' interpretation of "enduring monument" is questioned by Kutner in the light of contemporary understanding of the meaning of that term. Under Illinois law only the Attorney General could act on behalf of the beneficiary.\(^8\) When the Attorney General chose not to enforce the terms of the trust, no remedy existed.

Kutner's participation in this case led to his appointment as special Assistant Attorney General to draft a new statute. But he regards the act in its final form as having failed to provide the safeguards revealed necessary by the Ferguson case. To Kutner an effective charitable trust law must require registration with a designated state officer, trustees must be required to submit regular reports of the financial activity of all charitable trusts, there must be effective enforcement provisions, and the beneficiaries must have standing to sue.

Kutner regards the present Illinois Act\(^8\) as effectively meeting the registration requirement by providing for registration by the trustee of the trust instrument and powers with the Attorney General. However, this provision does not apply to religious groups nor to trusts operated for education or hospital purposes. Illinois is unique in providing for a minimum size of trusts covered by the Act.

The Illinois Act also provides for the filing of annual reports, but banks and trust companies are excepted, which emasculates the Act. Kutner contends that ordinary state and federal supervision of banking institutions offers little protection. The statute also failed to permit...

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beneficiaries to have standing. Kutner believes that despite the new statute, the same kind of fraud, as was perpetrated in the Ferguson Case, is still possible. However, at the initiative of a new Attorney General, the directors of the Art Institute, through their attorneys, announced that the accumulated income from the principal of the Ferguson Monument Fund of $1,000,000 would be used to erect statuary in the City of Chicago, demonstrating that even the weak 1961 Act can be effective in the hands of conscientious public servants.

Kutner would amend the Illinois Charitable Trusts Act to provide that trustees failing to register to file periodic written reports be subject to a fine of not less than $500 nor more than $10,000, or a prison term of not more than one year. He would also provide similar penal sanctions for a trustee who is found to have intentionally and materially violated his beneficiary responsibility to the intended beneficiaries of the trust. Kutner would also allow for a suit to be brought in the name of the state to secure the proper administration of the trust by any ten or more interested parties, a donor to the trust, or a member or prospective member of the class for the benefits of whom the trust was established. As to why he would require "ten persons" in order to bring suit is to suggest that in numbers one can dilute the possibility of corruption.

Kutner's suggestion as to standing for trust enforcement has inspired a Wisconsin statute, 82 while his recommendations for imposing penalties upon trustees appear to have inspired an Ohio statute. 83 He has surveyed the statutes of other states, contending attorneys must be aware of their content in drafting a trust instrument. 84 Kutner, however, deliberately does not discuss the role of the Federal Government in administering charitable trusts through the Internal Revenue Statute which could be amended to supplement state administration. The issues in that forum are drastically different.

C. Crime-Torts

In a scholarly article, 85 Kutner has argued for the establishment of the right of victims of criminal acts to bring civil action for compensation. He coined the term crime-tort, the liability of a governmental unit for failure to protect its citizens. He noted the tendency of recent decisions to sweep away the doctrine of sovereign immunity. For example the case of Schuster v. New York 86 recognized the obligation of state authority to exercise special care in the protection of persons who have assisted as informers in leading to the prosecution of criminals. Kutner argues for

82. WIS. STAT. ANN. § 231.34(1) (1963).
an extension of the *Schuster* doctrine for the protection of all citizens. To Kutner such an action would partake partially of the nature of an action for breach of contract and partly as an action for tort. An implied contract is suggested in the fact that the individual pays taxes, which is to be regarded as consideration for which the government in return provides means for the general welfare, including police and fire protection. When the governmental unit fails in its consideration so that a taxpayer or third-party beneficiary is injured, there is a breach of contractual duty. The injuries arising from inadequate police protection are reasonably foreseeable and, therefore, should be compensable. Another *quid pro quo* aspect is that the individual's right to self-defense and self-protection has been limited by laws outlawing the right to carry concealed weapons while police are given greater authority to make arrests.

The tort involved is that implicit in crime and violence, especially in high crime rate districts, is the element of negligence. The tort would also be predicated on the right of an individual to be free from criminal acts. In addition, recent developments in the area of strict liability may be applicable. Present day urban civilization should be regarded as an enterprise wherein all who benefit should assume the risk of increased liability. Kutner notes legislation for compensating victims of crime in New Zealand, Britain and California and focuses upon the proposal of Senator Yarborough and Representative Green for compensation at the federal level.87 However, his preference is for compensation through judicial proceedings.

This author's objection to the administration compensation plan is that it precludes the basic premise of the system of torts to compensate the victims of accidents for the loss sustained. The money damages award for injuries suffered by the victim of a crime properly belongs within the province of courts and juries. Furthermore, there would be no limit to damages. It has been argued that litigation in ordinary courts results in undue delay and expense as well as in the necessity of contending with burdensome technicalities of proof. The argument has some conceded validity but it is submitted that there are countervailing arguments which outweigh these considerations.

A commission that sits in session and hears a large number of cases will soon lose its perspective and false and improper standards may be established. As the volume of cases increases, so will institutionalization. Another problem in the proposed federal bills is the limitation upon compensation for attorneys. This could well limit the enthusiasm of the bar in representing crime victims. This limitation when viewed together with the institutionalized processes of a commission could prevent the plan from accomplishing its end. The fresh view of ever-changing juries

87. The proposed bills are set forth at 41 Notre Dame Law. 501 (1966).
can preserve the integrity of adequate compensation for victims of crimes, that is, remedy in direct proportion to the wrong.\footnote{88}

Kutner's urging that redress for crime-torts be obtained through civil actions in judicial proceedings with determinations of awards by juries is original. The compensation for victims of criminal acts essentially embodies social legislation\footnote{88} similar to workmen's compensation, a point Kutner himself concedes when he argues for strict liability on the enterprise theory. Apparently, he would not account for contributory negligence. Obviously, no one would contribute to self-inflicted crime violence. Therefore, the only determination the jury would make is for the amount of compensation. Whether jurors, who are likely to be taxpayers, would be sympathetic in setting compensation could open a new segment of compensatory and punitive damages.

Furthermore, as has been the experience in other tort actions—particularly regarding automobile injuries, the right of recovery has been thwarted by crowded court calendars. Because of this very problem, proposals have been made to substitute other institutional remedies in auto collision cases.\footnote{89} Kutner is not required to present any empirical evidence that a commission which would hear a large number of cases "... will soon lose its perspective and false and improper standards may be established." Such commissions have functioned with regard to workmen's compensation. Where a commission or administrative agency should depart from established standards, there would be the check of judicial review. Moreover, a scheme could be devised where a victim of a crime-tort could have the option of instituting a civil action in a court of law or of seeking recompense from a commission. As to concern for attorneys' fees, this would be met by more liberal statutory limitations. Fee limitations in workmen's compensation statutes have not apparently discouraged attorneys from litigating these cases. Conceivably, provision could be made for the state to retain special attorneys to represent crime-tort victims.

Kutner, apparently, would permit compensation for all crimes regardless of where committed. But should the victim of a crime be entitled to compensation when he has invited the perpetrator of the act onto his property or has entered the perpetrator's property? Should an automobile driver who becomes the victim of a hitchhiker, despite police warnings, be entitled to compensation? What are the rights of a victim who conspicuously carries a large sum of money or a valuable object on a deserted street? Should a scantily clad female who walks in a deserted area frequented by burly males and becomes the victim of sexual molestation be permitted to recover from the governmental unit? What if an individual leaves a valuable object unattended and easily accessible to any in-

\footnote{88. Kutner, supra note 85, at 501.}
\footnote{89. Comment, Compensation to Victims of Violent Crimes, 61 NW. U.L. REV. 72 (1966).}
truder? What of an auto theft where the manufacturer fails to provide an adequate locking device? Clearly, many problems are involved in developing the applications of the law of crime-torts. Kutner rejects these speculations. He submits that the act of crime-tort is res ipsa loquitur.

D. INDUSTRIAL RELATIONS

One of Kutner's major interest areas has long been labor-management relations. In this area, Kutner suggests clinical psychiatry and the restructuring of the industrial system.

Shortly before his death in 1963, Senator Estes Kefauver had planned, through his chairmanship of the Senate Anti-Monopoly Subcommittee, to initiate an investigation of labor unions as a monopoly force in the economy and its exemption from federal antitrust prosecution. Kutner was one of his original advisors in the creation of the Kefauver Crime Committee of 1949 and was to be his associate in this investigation. The blueprint for this investigation was to have been a law review article by Kutner. He questions the need for the continued “special privileges and immunities” conferred by Congress upon unions, including the exemption from income taxes and freedom from federal antitrust prosecution, alleging that under this umbrella of congressional protection unions have achieved disproportionate power, wealth, and economic dominance. He claims “the public welfare is threatened today by the fact that the nation's economy is to a large extent controlled by that ten per cent of the population who comprise the labor union force.” He proposes the following program:

I. Labor union immunity from antitrust prosecution in those activities which are essentially directed toward control of the product market should be abrogated. More specifically, legislation should outlaw direct union attempts to: (a) control prices, (b) control areas of product distribution, (c) control the amount of goods produced, and (d) control the number of firms which may engage in the production and distribution of goods.

II. Industry-wide negotiation should be made illegal, with limitations imposed on the size of collective bargaining units. The least ambiguous size boundary would be that of the enterprise or employer—generously construed. It should be further provided that collusion between manage-

94. Id. at 2.
95. Id.
ment or union bargaining units would be illegal, as would also be financial assistance of one unit by another.

III. Present labor union exemption from the federal income tax should be removed.

Kutner contends that, while union antitrust exemption under the Clayton, Norris-LaGuardia and Wagner Acts was justified when the position of unions was weak and ineffectual, this exemption is now "antiquated" because unions now negotiate from a position of great strength. He distinguishes problems involving the relationship between the union and its members from those involving the relationship of the union as a whole and the remainder of society and that present labor legislation is unsuited for the latter and that the antitrust laws might be applicable. Involved is the increasing tendency for unions to ignore the general welfare in engaging in strikes and the growth of union wealth which is being used as a weapon of economic coercion. A small union may use a strike as a weapon against a large segment of society, such as occurred in the New York dock strike of 1961 and other instances of industry-wide shutdowns paralyzing major sectors of the economy.

Regarding financial power, Kutner contends that the AFL-CIO has direct and indirect control over funds as great as three billion dollars and an estimated annual income of six hundred twenty million dollars. "The really remarkable thing about the great wealth of American Labor Unions is not the wealth itself, but the fact that union funds represent the greatest source of capital in this country totally free of governmental control," and that "short of larceny, union leaders are in no way legally inhibited in their use of the vast sums at their disposal." In one instance, as referred to by Kutner, involving the United Hatter's Union, the union bought a controlling interest in a company producing felt bodies and forced the millinery firms employing union members to buy their felt bodies from it. Furthermore, combined financial resources may be pooled as strike funds, thereby creating an overpowering position with regard to the small employer. Kutner, therefore, contends that unions should be made responsible for their income. In his approach Kutner produces a drawing line between licit and illicit union activity.

It is suggested that the dichotomy should be between union activities in the labor markets on one hand, and in the product market on the other. Activities in the labor market (e.g., control of the number of workers, their wages and their working conditions) have always been the heart of any union program, if not union raison d'être. Union excursions into the product market are relative afterthoughts, and are hardly essential to the union's cause. While it can be argued, therefore, that because of their very nature unions should be allowed to restrain trade or monopolize in the labor market, there is no reason to allow

96. Id. at 13.
unions the same breadth of activity in the product market. Indeed, neither the fundamental nature nor honest effectiveness of unions would be damaged by simply requiring unions to restrict their activities to the labor market only. This is precisely the conclusion that was reached by the Attorney General's Committee to Study the Antitrust Laws when it recommended that market control and other restrictive union practices which are not legitimate union objectives to be made unlawful.97

Kutner, therefore, proposes to remove antitrust immunity in the product market as affecting attempts to control prices, areas of product distribution, the amount of goods produced, and the number of firms which may engage in the production and distribution of goods. The unions would remain immune from prosecution as affecting legitimate collective bargaining activities. The possibility of crippling nation-wide strikes would be minimized, according to Kutner, by making industry-wide negotiation illegal. Gifts of strike funds between unions would be made illegal. The unions' investment income, as distinguished from union dues, would no longer be exempted from income taxation.

Kutner would combine these enactments with his proposal for the establishment of an "Economy Court" before which would be settled any labor dispute in which the public had a vital stake.98 He would apply the concepts of "due process of law" to labor relations or what he labels as "Due Process of Economy." Kutner envisages such a court as protecting the public interest by permitting free collective bargaining within the framework of judicial economic standards. He envisages such a court as comprised of three judges sitting en banc who would be trained as economists with the public interest to be represented by a special Assistant Attorney General from the Department of Labor. Either side to a labor dispute could initiate a complaint. The proposed court would have summary power to issue decrees enjoining action. Where no agreement was reached within six months after termination of a collective bargaining contract, the parties would appear before the court for a judicial determination. Decisions would bind both parties. The court would protect either weak unions or weak employers from economic muscle power. This court would also apply principles of fairness to such matters as job security resulting from automation.

Kutner's proposals have received international interest of prominent industrialists, corporations, and members of Congress who have formed a committee to study them and to draft proposed legislation. However, these proposals are highly controversial, though the need may exist for new legislation in the area of industrial relations.

The proposal for an Economy Court really envisons the establish-

97. Id. at 15.
ment of an administrative agency or what may be called a legislative, as
distinguished from a constitutional, court. Kutner, however, attempts
to distinguish such a court from an administrative agency by its power
to issue summary decrees. The proposal calls for the establishment of a
"court" in each judicial circuit, and envisions the establishment of uni-
form standards of due process of economy. The development of mecha-
nisms to reconcile differences between the "courts" of each circuit would
develop by case precedent. He deliberately leaves open the question of
how the judges are to be selected (whether as representatives of labor
and management or by the President) and as to whether they are to have
life tenure, a fixed term like the members of the National Labor Relations
Board or to serve at the pleasure of the President. This should be a
matter of legislative consensus. Provisions for review are also left open
suggesting finality of a court ruling. These are matters of primary con-
sideration in formulating such a proposal, and the flexibility of Kutner's
proposal is its great strength of realism.

A fundamental problem and asset in Kutner's proposal is the open
definition of what is meant by the public interest, involving philosophical
considerations. American society is composed of diverse and competing
interest groups, and public policy is made through a political process
which entails the reconciling of these competing interests. Therefore,
the proposed Economy Court would necessarily be a political institution.
Its conception of the public interest would be subjective. Though it is
true that even the constitutional courts are to an extent political in that
subjective decision-making is involved, this proposed court would have
even broader powers and exercise an even greater prerogative. The nature
of a dynamic economy is such that it could not adhere to precedent or
principles of stare decisis. The course of the American economy would be
vested in the hands of a three-man court. Kutner's rhetoric of free enter-
prise contemplates and suggests a fundamental change in the collective
bargaining process and in the organization of the economy. A party to
a labor dispute which would feel it could benefit from a favorable Economy
Court decision would purposefully deadlock negotiations to induce com-
pulsory arbitration. Clearly, the court would have immense power over
the economy. Since Kutner is indeed advocating a radical reorganization
of the economic decision process, he provokes and challenges the Congress
to legislative adulthood.

For emphasis, Kutner somewhat exaggerates the economic power
of labor unions. By his own figures the total annual income of all unions
is over six hundred million dollars annually. But such giant corporations
as General Motors, Standard Oil of New Jersey, and American Telephone
and Telegraph have annual profits which are more than double this
total. Clearly, the economic impact of industry upon the economy far
exceeds that of organized labor. But this argument does not diminish
Kutners' proposal.
Kutner's proposals to apply the antitrust laws to certain labor union activities merit consideration to eliminate certain abuses. But his proposal to forbid industry-wide bargaining is startling, especially with regard to such oligopolistic industries as steel where one or two companies are dominant and set pricing policies for the entire industry. In some instances if a union were compelled to negotiate with each enterprise separately, it would place the enterprise at a competitive disadvantage either through a strike threat or by forcing it to pay higher wages than its competitors. The proposal to prevent inter-union funding of strikes may harm weaker unions and inhibit organization in such areas of the nation as the South where wage rates are low. This, however, does not impair the concept but illustrates some problems with which Kutner grappled.

A new problem has been the emergence of the conglomerate enterprise whereby a single management controls diverse companies in diverse industries. The response may be conglomerate labor unions. Kutner's flexible proposal anticipates this development. Moreover, the emergence of automation and the managerial society has radically changed the corporate structure and affected the growth and organization of unions. Legislation must anticipate this development and be cautiously formulated in a pragmatic manner.

Kutner's proposals may be regarded as a contribution to the discussion for developing new tools to deal with the newly developing problems of industrial relations. But, as he would himself recognize, they are not ultimate solutions. As he wryly comments, "Like life, all is transition."

E. Unfair Comment: A Warning to News Media—Free Press and Fair Trial

Another area of concern to Kutner has been the safeguarding of an individual's freedom through an impartial trial free of news media intrusion. In this regard, he wrote a scholarly article on prejudicial publicity of the accused and criminal proceedings published in the University of Miami Law Review in 1962. The article reviewed the cases and discussed the state of the law up to that time in an attempt to set forth guidelines for defense counsel, prosecuting attorneys and judges. The article offered a useful guide on this subject and anticipated contemporary discussion. This precipitated nation-wide debate, seminars and voluminous tomes. In this instance, Kutner epitomized the Socratic gadfly. Cases were reversed on Kutner's anticipating instinct for the correct trend in the judicial arena affecting defendants' rights. Publishers and bar associations throughout the country picked up the baton Kutner cogently waved.

IV. THE ADVOCATE AS PRACTITIONER

Though Kutner has contributed to the development of the law by his legal writings, his major contributions have been as a practitioner. He has not hesitated to expand the law into new fields. Some of these contributions will be discussed.

A. Protecting the Rights of Prisoners and the Accused

The recognized rights of the accused in American courts today were established by the relentless and sometimes bitter struggles of advocates like Luis Kutner. His pioneering has helped assure that all prisoners are given access to courts to petition for the Writ of Habeas Corpus. Applying the ancient common law principle of bringing jailed inmates before the courts every thirty days, Kutner obtained a Federal District Court injunction compelling the prison warden to permit prisoners to be brought before the court on a monthly basis. In one month alone he brought over two hundred prisoners before a United States district court for a determination of the legality of their detention. No longer could persons be taken away and detained indefinitely without a charge being brought against them. Where the federal prosecutor had brought charges against a number of individuals and had them held for an extended period of time without a trial, Kutner was able to induce a district court judge to act on his own motion to order the release of twenty prisoners because the prosecution had delayed the prosecution unduly.100

In another dramatic incident, Kutner compelled a warden of the Stateville Penitentiary in Joliet, Illinois, by court order to appear before a federal district court judge who, in an opinion presented across the bench, ordered him to refrain from interfering with the rights of prisoners to prepare and file petitions for Writs of Habeas Corpus, thus establishing the principle that all prisoners have civil rights including the right to file habeas corpus petitions in federal courts, regardless of whether they may appear to lack merit. It is for the court to make the determination and not the warden of a prison. At the time, Kutner was denounced as opening the jailhouse doors.

In 1949, Kutner was the focus of wide attention when he filed suit under the Civil Rights Statutes102 in the United States District Court in Chicago on behalf of three convicts who were confined in Stateville Penitentiary seeking damages in the sum of three hundred thousand dollars.103

100. This information is based on conversations with Kutner and cannot be readily documented. The specific case was United States v. Harold Lawrence, No. 32432 (N.D. Ill., Mar. Term, 1940).
101. This information is likewise based upon conversations with Kutner.
103. Id.
The suit charged that the plaintiff prisoners and some eight thousand others of their class in Illinois were denied their civil rights in that they were subjected to cruel and inhuman treatment by being arbitrarily placed in solitary confinement—"the hole"—for extended periods of time, being denied an adequate diet, and in being subject to a form of slavery by not having their cases considered for parole. The suit further charged prison officials with making personal use of prison labor and of taking a portion of the proceeds from the prison food concessions. Though the District Court dismissed the case because of lack of jurisdiction and this ruling was affirmed by the United States Court of Appeals for the Seventh Circuit, the publicity led to parole for the prisoner plaintiffs. The publicity generated by the suit resulted in the initiation of prison reforms.

Kutner's representation of James Montgomery, the Waukegan Negro who was allegedly framed by the Klan to serve a life sentence for allegedly raping a half-witted white woman, was in the highest traditions of the legal profession.104

James Montgomery had served twenty-two years in prison. He had protested police harassment of Negroes in Waukegan and sought to organize Negroes to resist. The police had raided his home and made his house a shambles. Later, when he threatened to sue for trespassing, police authorities gave him a check for $600. The Klan arranged to frame him by inducing a mentally deranged woman who had been bruised and beaten to accuse him of rape. The Klan had threatened to Lynch him, and he was subjected to police brutality. A twelve-minute trial was conducted with the jury being selected before he was brought to the courtroom. After the woman had testified, the prosecution rested and the jury convicted him. His attorney was intimidated by the Klan. Kutner conducted his own investigation of the case, studying the trial transcript and finding witnesses with regard to the Klan's plot. Searching hospital records for ten nights, he found a physician's report that the woman who had made the charge and testified had not even been molested, let alone raped. By gaining secret admittance into the Klan headquarters (with the aid of two clients he had freed with Habeas Corpus), Kutner obtained a record of the plot against Montgomery. He found the attending physician and a nurse and also learned that the woman, who had subsequently been confined to a mental hospital, had died, chaste as her religious faith had dictated. With this evidence he attempted to obtain a pardon for Montgomery from the Governor who denied his petition. Kutner took no fee for his services, lost over one hundred thousand dollars in legal business, and expended extensively from his own funds.

After having clearly exhausted all state remedies, Kutner petitioned for a federal Writ of Habeas Corpus which was granted by United States District Judge Michael L. Igoe of the United States District Court in


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Chicago in an opinion which characterized the Great Writ as "the sword and shield in the long struggle for freedom and constitutional government." The judge denounced the trial as a "sham and pretense" and excoriated the tactics of the prosecution in suppressing the hospital records. Citing *Jones v. Commonwealth*, the court found that these tactics and the general conduct of the trial deprived Montgomery of his right to due process of law under the fourteenth amendment. Though not referring to any specific provision of the first eight amendments, Judge Igoe held that Montgomery was denied what may be regarded as the standards of fundamental fairness as embodied in the concept of due process.

The *Montgomery* case was only one of many cases where Kutner obtained the release of a prisoner who had been framed. Another case involved Raymond Boyd, a small-town Iowa boy who was wrongfully convicted of murder and was sentenced to life imprisonment, serving seventeen years in prison. In 1931, he had been in a speakeasy in Peoria where he had lost money gambling. He then saw the dealer dealing from the bottom of the deck; and, when he complained, the dealer reached for a gun. Boyd was knocked unconscious. After he had regained consciousness, he had found someone had been killed and he was charged with the murder. The prosecutor offered to drop the charges in return for payment of $5,000. Boyd's mother withdrew this sum from the bank, but the prosecutor raised his price to $40,000. When the case came to trial, Boyd's attorney moved for a continuance to prepare their case, which the presiding judge, who later was appointed to the Illinois Supreme Court, denied. The attorney then stated that their only alternative would have been to plead guilty, a plea which the judge indicated he was willing to accept. The prosecutor charged that Boyd had been mentally ill, but the judge failed to order an investigation. Shortly after the filing of this case, the prosecutor, who had subsequently become state's attorney, was himself charged, along with other Peoria officials, with having links to gamblers. Before Kutner had entered the case, Boyd's arthritic mother had valiantly championed her son's cause, spending over $50,000 of her own funds.

Kutner's petition for a Writ of Habeas Corpus was dismissed by Judge Igoe, though jurisdiction was retained to permit leave to appeal. When Kutner filed a Petition for Appeal to the United States Court of Appeals for the Seventh Circuit, Judge Igoe, in conference, indicated that the reason he had dismissed the petition was because the hearing of the matter would have meant possible embarrassment to the judge who

105. *Id.*
106. 97 F.2d 335 (6th Cir. 1938).
108. No. 47-171 (N.D. Ill., filed 1948). The facts regarding the disposition of the case are as revealed to the writer in conversations with Kutner.
had convicted Boyd and had subsequently been appointed Justice of the Illinois Supreme Court. He urged Kutner to withdraw the petition and promised he would intervene with the justice and the governor to obtain Boyd's release. Boyd was subsequently released.

Kutner was threatened with execution by the crime syndicate when, in 1948, he opened the prison gates for four men who had been confined for thirteen years for a murder which they did not commit. The four—Bruno Austin, Alex Shapiro, Morris Jacobs and David Sinnenberg—had been sentenced in 1935 to life terms. As youths they had engaged in petty crimes; and, after being informed that a West Side Chicago grocery store was a front for a crime syndicate operation, three of the youths entered the store one morning with guns drawn while the fourth remained outside in a car. At that point a customer was leaving the store, but was suddenly felled by a fatal chest wound from a gun shot. The youths claimed at their initial trial that the shot had come from the rear of the store and that they had fired no shots, while the owner had testified there was nobody in the rear at the time. The owner's son also had a gun, but testified he was asleep. A ballistics expert had testified that he had examined two shotguns: a revolver and a Luger pistol; that it contained four remaining cartridges in the clip which ordinarily held nine cartridges; and that the barrel of the Luger showed a smokeless powder residue, indicating the weapon had been recently fired. Though on cross-examination, he admitted making a ballistics report to the police, no copy was made available for submission in evidence. On further cross-examination, the expert admitted that the residue could have remained for three days after the gun had been fired. One of the youths identified the owner's son as having fired the shots and that another of the youths had been wounded. The police had arrived only twenty minutes after the shooting and were clearly concerned with outward appearances. The prosecution mobilized its efforts to convict the four youths despite clear evidence to the contrary.

The youths filed a writ of error to the Illinois Supreme Court, which was denied. Certiorari was never brought to the United States Supreme Court as the youths were without funds to employ counsel and were prevented from seeking review pro se within the statutory period because of a then existing practice in Illinois prisons preventing persons incarcerated by the state from access to the courts except by counsel hired to represent them.

In 1945 the store owner's son, after being inducted into the armed forces, experienced a religious conversion and, on the advice of his chaplain, filed an affidavit confessing that he had actually committed the


murder and had given perjured testimony. A polygraph test confirmed that he was now telling the truth. New attempts were made to achieve the youths' release. The trial judge stated in an affidavit that if this testimony had been heard at the trial, the youths would not have been convicted. However, a Petition for a Writ of Error Coram Nobis was denied in the Criminal Court of Cook County with the presiding judge holding that, since more than five years had elapsed, Error Coram Nobis was unavailable. This holding was affirmed by the Illinois Appellate Court and by the Illinois Supreme Court without the rendering of an opinion. An application for Habeas Corpus which was brought to the trial court was also denied. Certiorari was then brought to the United States Supreme Court and denied. Clearly, the youths had exhausted all state remedies. A Petition for Writ of Habeas Corpus in the federal courts was also dismissed.

A second petition for a federal writ, alleging grounds for federal jurisdiction, was filed in forma pauperis, and Kutner was appointed amicus curiae. Kutner began to fight like an enraged lion. Judge Igoe granted a hearing, finding adequate grounds for jurisdiction in that the youths were denied the due process of law under the fourteenth amendment. The State filed a Petition to dismiss the Writ and after Kutner filed a motion to deny the State's motion to dismiss, a hearing was held. During the argument, Kutner's mother was in court on the only occasion to watch her son in action. The motion was denied and the state filed a return to the Writ with an answer filed, and the court held a hearing. The Petition for Writ of Habeas Corpus charged that the convictions were obtained in violation of due process by virtue of fraud, subornation of perjury and suppression of evidence. Charges of fraud alleged were that a new gun was substituted for that belonging to the grocer's son; the firing of the youths' gun for a ballistics test after their arrest; a ballistics test of their gun which was not fired during the robbery; and the suppression of all documents and evidence which would have proven the youths innocent of the crime of murder. On the charge of subornation of perjury the Petition further alleged the false testimony of the ballistics expert that the youths' gun had been recently fired; that he falsely stated the ballistics report was in the possession of the police at the time of trial; and his withdrawal of the records from the Coroner's office. On the charge of suppression of evidence, the Petition alleged that the store owner's son suppressed the truth of his shooting and killing the customer when he intended to kill the youths, his hiding of the weapon in the sand in the basement of the grocery store, the suppression of the bullets and shells found at the scene of the alleged crime, and suppression of the ballistics report.

Judge Igoe, after hearing the evidence, ordered the youths released.

He held, in an unpublished opinion, that "the writ of habeas corpus is available not only to determine points of jurisdiction, *stricti juris*, and constitutional questions, but to prevent a complete miscarriage of justice," and "will issue if the newly discovered evidence is of such character as completely to undermine the entire case on which the prosecution is based." He castigated the handling of the matter by the State of Illinois.

Of significance is Judge Igoe's statement as to due process of law.

>[D]ue process of law is that process of impartial law which is binding because it is right. It implies in its original conception respect for the law because it safeguards the rights of all persons who live in free and untrammeled intercourse in a society of their fellows. Due process is concerned with the ultimate consequences of calculated realities affiliated with fact. It senses the mistakes of the past and wants to rectify them. It has great passion for interposing reason for dilemma in integrating a socio-legal society. It equips the lonely fighter for judicial progress with tools and ammunition. It corrects the errors of humans who alternately minimize and maximize the legal norm between choice and promise. It provides men with faith.

Judge Igoe after further discussion commented further:

There is nothing whimsical in due process. It provides 'meaning of law' in the lives of men and women. It provides deft scalpel for laying bare of half-truth or an overstated truth, or in probing the legalistic insolvency of some brave array of argument in support of specious resistance to the liberty of one wrongfully in custody. It creates synthesis out of confusion. It must not be used to cloak or condone a sovereign state's *cumbersome* legal procedures. In the case at bar, it is a sharp instrument for puncturing many pretensions, effectively probing for obscure motivations and for uncovering hidden truths."

The judge quoted approvingly from Mr. Justice Frankfurter's opinion in *Adamson v. People of California* concerning the fourteenth amendment's due process clause as conferring rights independent of those enumerated in the Bill of Rights.

This opinion should be considered together with Judge Igoe's published opinion in *Montgomery* where he had likewise stressed the use of the concept of due process and habeas corpus. The cases dramatically demonstrate the interrelationship between due process and

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112. United States *ex rel.* Austin v. Ragen, No. 47-399 (N.D. Ill., filed 1948).
113. *Id.* at 11-12.
114. *Id.* at 43.
the writ of habeas corpus as the sword and shield. They stand as great monuments indeed to a judge who has passed away but recently. Nevertheless, the role of Kutner as advocate in exerting his efforts to bring these cases before the court and in presenting creative argument for the judge to present his opinion and develop precedent is vastly significant. A comparison of Kutner’s brief and memoranda with the judge’s opinion graphically demonstrates how the one influences the other.

These cases reflect the inadequacies of the American legal system in showing that the innocent may be convicted and punished unjustly. The very nature of the judicial system, which is dependent upon making subjective factual determinations, makes such mistakes inevitable. However, to minimize the occurrence of such mistakes in criminal cases, the standards of due process place obligations of fairness upon the prosecutor within the context of the adversary system. Clearly, these cases epitomize a flagrant abuse of the prosecutorial process. The most shocking aspect, however, was the failure of state legal and political institutions to act to rectify these judicial errors after they had become apparent. Only the happenstance appearance of an advocate like Kutner, who was willing to invoke federal remedies, enabled justice to triumph. Today, thanks to the efforts of such advocates, precedents have been established which protect the rights of the accused to a greater extent. Present-day legal procedure manifests a greater concern for assuring that the innocent should not be convicted. But the danger remains. The fate of a man unjustly convicted should not depend upon the happenstance of an encounter with a sympathetic advocate. Though Kutner’s campaign in the 1940’s for poor man’s justice was to be commended, the ultimate solution lies in establishing an institution, perhaps an ombudsman-type plan, to ferret out such cases.

B. Protecting the Rights of Soldiers

During the Korean War, some American Armed Forces personnel who were captured by the Communist forces submitted to the pressures of degradation, brainwashing, and ultimately “collaborated.” Following the release of American prisoners, accusations were made regarding the behavior of many. The Army conducted special inquiries pursuant to a presidential executive order that pierced the armor of due process.

One case which received considerable attention through the Chicago Tribune involved Douglas Stephens, who had been a prisoner of war for more than two years. Two months after he was freed, he was given


an honorable discharge and re-enlisted a few months later. Then in November 1954, he was subjected to charges that he “collaborated” and “consorted” with the enemy while a prisoner. It was alleged he had made broadcasts and received preferential treatment in the form of better medical care; was invited to go on walks with camp officials; was granted a relatively greater amount of freedom of movement about the camp; had received better food, such as candy, apples and other delicacies; and had been assigned to little or no work details. Stephens was further accused of assisting the Communist propaganda campaign by making recordings which were used for propaganda purposes; writing articles concerning the good treatment of prisoners of war; circulating and signing petitions promoting the Communist cause; participating in study group meetings and attending lectures on the alleged use of bacteriological warfare by the United States Air Force; spending a great deal of time reading a great number of books on communism; and playing cards, volleyball, basketball and going “swimming” with prison camp officials.

Stephens denied the charges, though claiming he made a broadcast when a prison camp official threatened physical indignities and that he would not see his folks again. Stephens was not subjected to a formal court martial but only to a hearing before a special Field Board of three colonels under a procedure which permitted him to retain counsel but required him to pay his own expenses for calling witnesses on his own behalf, many of whom were scattered about the globe. He could not face his accusers nor cross-examine them, and only the Board could have access to the government's evidence. Though five sergeants submitted depositions on his behalf and after he had passed a lie detector test, the Board recommended that he be separated from the service with less than an honorable discharge. He was denied the benefits generally accorded veterans and the special $2.50 per day bonus awarded by Congress to former war prisoners.

Kutner filed a Complaint for Declaratory Judgment, alleging that Stephens was denied his constitutional rights to due process of law under the fifth amendment to the Constitution and that the Army proceedings against him had constituted a Bill of Attainder. Secretary of the Army Wilbur Brucker was designated as the Defendant. A hearing was held. The Army, eager to avoid a legal precedent, agreed to restore full rights to Stephens and the 134 other veterans similarly convicted. In a subsequent proceeding before the Foreign Claims Commission, Stephens and the other former prisoners of war were granted full compensation. Kutner and the Army stipulated to have the case dismissed. The Army subsequently revised its procedures as Field Boards were abandoned. Kutner, who had assumed the case without a fee, had thus vindicated the rights of veterans and was instrumental in changing Army procedure.

The law has increasingly recognized that constitutional rights apply to servicemen. The Court has also recognized that an ex-serviceman need not be compelled to stand trial for offenses allegedly committed while in service.

C. Habeas Corpus and Inter-Country Adoption

Kutner demonstrated the use of Habeas Corpus in protecting the rights of a child and his adoptive parents under an inter-country adoption arrangement from the arbitrary and capricious action of a social welfare agency involving a Catholic Archdiocese.

The adoptive parents had, pursuant to the laws of Quebec, contracted to adopt a child conferring upon the parents' rights of de facto adoption: the right to the child for a six-month probationary period. In compliance with the Immigration and Naturalization Statute, the child was granted a visa and admitted as a non-quota immigrant to the United States. The Quebec adoption agency, Le Sauvegarde de L’Enfance, delegated the Catholic Home Bureau in Chicago to act as its agent in servicing the adoption, which was under the administration of the Chicago Diocese. Subsequently, the Joliet Diocese was split from the Chicago Diocese, and the case was transferred to the latter with concomitant supervision, authority and obligation. The child lived with his adoptive parents in Addison, Illinois.

The child then suffered two household accidents, first bumping his head in a collision with his adopted sister, and then hurting his head again by slipping in the bath tub and manifesting such symptoms as a wobbly gait, in-turned eye, and inability to reach and pull a light string. The family pediatrician referred the parents to a specialist in neurology and pediatrics at Illinois Neuropsychiatric Research Hospital where the child was taken and operated upon to alleviate internal pressures caused by the injuries. The mother visited the child virtually every day, changing and laundering his linen and hospital gowns. When the adoptive parents were advised that the child had progressed sufficiently to be released as an out-patient, the Catholic Charities of Joliet refused to let the hospital release the child to the parents. Orders were issued to the hospital and the parents that they were no longer permitted to visit the child. Subsequently, these orders were cancelled with a notation on the hospital records that the "hospital does not have authority for this." However, the director of the Catholic Charities of Joliet wrote a letter to the parents on the same day barring them from seeing the child and sent a

120. Id.
122. Berard v. Catholic Home Bureau, Habeas Corpus Case No. 66 L 6182 (Cir. Ct. of Cook County, Ill.).
carbon copy to the hospital. The director arranged to have the child placed in a foster home and sent a letter to the attending physician introducing the foster parents. But at a meeting at the Chancery Office in Joliet, the Director reassured the parents that the child would be all right in a few weeks and that they would be allowed to visit him in the hospital, deliberately concealing his intention, and definite arrangement, to place the child in a foster home. Shortly before Christmas, the child was abruptly taken out of the hospital, though he was brought to a hospital for the adoptive parents to see briefly on Christmas day and then returned to the foster home. The adoptive parents were required to pay the hospital bill.

The parents, after having exerted every effort to regain the custody of the child, including two visits to Quebec, read and heard about Kutner's speech before the Inter-American Bar in San Juan, Puerto Rico. A Petition for Adoption was filed in the Circuit Court of du Page County, Illinois, which was dismissed on jurisdictional grounds in that the Quebec adoption agency had not accorded its consent in accordance with the requirements of the Illinois Statute. A Petition for Habeas Corpus was then filed in the Cook County Circuit Court pursuant to Illinois Statute, with the Catholic Home Bureau and its Director designated as Respondents. Investigation had revealed that the child was living in Cook County.

The Petition alleged that the adoptive parents were the duly qualified and acting guardians and were given legal custody and control of the child "in conformity with inter-country adoption procedures established between the United States and Canada, the immigration laws of the United States of America, and the adoption laws of the Province of Quebec, Canada and the State of Illinois." The previous Petition for Adoption had asserted rights under the comity of nations, the United Nations Charter, the Universal Declaration of Human Rights and the United Nations Declaration on the Rights of the Child, which was adopted by the General Assembly on November 29, 1959.

The Habeas Corpus proceedings resulted in bringing out in open court and through the press facts indicating collusion by the Catholic Charities of Joliet and its Director with the attending physician to deprive the adoptive parents of their child and that, though the Catholic Home Bureau of Chicago had been delegated by the Quebec agency to act as its proxy, no such authority had been delegated to the Catholic Charities of Joliet. Only a week before the scheduled hearing for the writ did a church official go to Quebec to obtain an affidavit of authorization to act on behalf of Le Sauvegarde de L'Enfance. Testimony by the Assistant Director of the Quebec Agency, who was brought to the trial by

126. ILL. STAT. ANN., ch. 65 (1965).
Kutner, revealed that the adoption contract with the adoptive parents had not been terminated and that their files indicated no reason as to why it should have been.

The local agencies failed to present concrete evidence to support their contention that the child had been mistreated. Though Illinois regulations require that a representative of an agency supervising an adoption must make home visits every ninety days, the home of the adopting couple was visited by a social worker only once during the eleven-month period in which the child was with the adoptive parents. The attending physician had made vague statements in a letter to the Catholic Charities that the child had been subjected to trauma as a cause for the injuries, but he was unable to provide a basis for this allegation when subjected to cross-examination. Furthermore, testimony by the adoptive father indicated the physician had made contradictory statements to him. The physician's testimony established that he had discussed the case with the Director of Catholic Charities in Joliet and had sent a letter to the nurses instructing them not to reveal the identity of the foster parents to the adoptive parents.

The local agencies apparently objected to leaving the child with the adoptive parents because they felt that, due to his illness, he was not a fit child for adoption, though they had subsequently placed him in two foster homes. However, the testimony of the father indicated the child had manifested symptoms of being defective when the adoptive parents first took him from the Quebec Agency at the age of twenty-seven months.

After the evidence was presented and Kutner was about to call Archbishop John Cody (now Cardinal), the Head of the Chicago Archdiocese, the presiding judge interrupted the proceedings and called the counsel into conference and indicated that he would telescope the proceedings and grant an order for adoption if the parties would agree to seek the final consent from the Quebec Agency. This was granted pending a check on the home by a social worker, and the adopting parents were then allowed to file a Petition for Adoption.

The significance of this case may be somewhat limited as precedent in Illinois since the state supreme court in a matter which also, ironically, involved Kutner as counsel, appears to have limited the efficacy of the Writ of Habeas Corpus as a means for adoptive parents to obtain custody of children from an agency by holding that the writ may properly be invoked only where the jurisdiction of the Court ruling upon a Petition for Adoption is collaterally attacked.128 This matter is again pending before the Illinois Supreme Court.129

However, the case discussed is of significance in apparently representing what may well be the first known successful use of the Writ of

129. Docket No. 41218.
Habeas Corpus to gain the custody of a child in an inter-country adoption proceeding. Furthermore, the case demonstrates the use of the Writ, when properly invoked, as a sword and shield to correct any and all injustices in piercing the sham and pretense of any proceeding.

The case also focuses upon certain unresolved problems of inter-country adoption. The federal statute and procedures provide for certain requirements which must be met to permit a child to enter the United States for adoption. The adopting parents must file affidavits of support and undergo an investigation by the Department of Health, Education and Welfare and the secretary of this department must then certify to the Attorney General that the couple are capable of caring properly for the child. The Attorney General then issues a permit, and the visa is authorized by the Secretary of State. The Statute provides that the adoption would be undertaken pursuant to state law.

Mr. Justice Black in *Hines v. Davidowitz,* 130 in holding that under the supremacy clause of the Constitution131 Congress had occupied the field and pre-empted state regulation as to immigration and the regulation of aliens so that a Pennsylvania statute requiring the registration of aliens was found to be invalid. Furthermore, where Congress, "by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty is the supreme law of the land [and] no state can add or take from the force and effect of such treaty or statute. . . ."

Kutner argued that because the federal law protects the rights of the alien child admitted to the United States for adoption and establishes a statutory scheme, a social welfare agency, acting as custodial guardian, should not be permitted—in acting under state authority—to interfere with these rights by arbitrarily taking the child from the adoptive parents nor by withholding its consent to the child's adoption, and that in these proceedings the court is pursuing a ministerial function in implementing the federal scheme.

Clearly, the case points to the need for Congress to clarify the statute to prevent a social welfare agency or other custodial guardian from arbitrarily withholding its consent to the adoption of an alien who has been admitted to the United States pursuant to the Immigration and Naturalization Statute and to permit either a state or federal court to grant the adoption if it finds such a course to be in the best interests of the child. The case further demonstrates that the court should not be compelled to surrender its decision-making functions to the whim and caprice of a social welfare agency in determining the child's custody and adoption.132

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131. U.S. Const. art. VI, § 2.
Another problem brought out by this case is the need for international agreements providing standards for the placement of children for inter-country adoption. The child was placed with the adopting couple by the Quebec agency after they had seen him only twice over a span of a half-hour and were not permitted to examine him in the nude, though they subsequently found chest scars indicating that he was operated upon for pleurisy and his behavior indicated he was a defective child. But the report of the Quebec Agency stated he was in good health. Furthermore, the relationship between this agency and the Catholic Home Bureau in Chicago was never formalized but only verbal, and the latter's authority was not explicit.

Though the Hague Conference on Private International Law has adopted a number of conventions focusing on problems of jurisdiction and conflict of laws with respect to adoption, these conventions do not focus upon the need for establishing standards involving sociological and psychological considerations in the placement of children for inter-country adoption. Such standards could, perhaps, be best achieved through a series of bilateral treaties with nations from which a sizable number of children are admitted to the United States for adoption.

D. Jewish War Veterans v. George Lincoln Rockwell, American Nazi Party: An Historical Precedent

The role of the advocate in making law was dramatically exemplified by Kutner's representation of the Jewish War Veterans in stopping George Lincoln Rockwell, the late self-styled "fuehrer" of the American Nazi Party, from demonstrating in Jewish neighborhoods within the City of Chicago.

In September 1966, as the long hot summer of racial clash was coming to a climax, the swastika suddenly began to appear in certain parts of Chicago where open housing demonstrations had been conducted by Dr. Martin Luther King. A branch of the American Nazi Party had been functioning in Chicago, and George Lincoln Rockwell flew in from his headquarters in Virginia to provide his leadership to white men who were violently resisting the Negro efforts for integration. To him the situation


was an opportunity for exploitation as part of his conspiracy to ultimately seize power and deprive Jews and Negroes of their constitutional rights.

He sought to link the Jews with the Negroes' struggle for equal rights by planning a mass rally and by marching on Jewish neighborhoods, contending that the Jews were behind the efforts to integrate the races. Whether by design or coincidence, he indicated an intention to demonstrate on Rosh Hashana, the Jewish New Year, thereby interfering with Jewish worship. The Jewish War Veterans of Illinois, one of the oldest of Jewish communal organizations, with 1500 members, sought to take action to stop Rockwell and found a ready advocate in Kutner, a long-time foe of Nazism and all forms of racism. Efforts by the National Jewish War Veterans Organization to deter Rockwell and his group from demonstrating in other cities had failed because of United States Supreme Court precedents involving the free speech provisions of the first amendment.

Kutner, however, in spite of opposition and disavowal by the National Organization and without any assistance of other Jewish Organizations, like Anti-Defamation League of B'nai B'rith, American Jewish Congress, United Jewish Appeal, American Jewish Committee, and others, decided to invoke the little used provisions of the Civil Rights Act of 1871, Title 42, Sections 1983 and 1985(3) of the United States Code. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage or any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutional laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Intended to protect the Southern Negro after his emancipation, there were no precedents invoking this provision to protect groups or persons from interference with religious practices.

That Rockwell and the American Nazi Party would be acting under "color of law" could be established, in that his organization was chartered as a corporation under the laws of Virginia and, in that, Rockwell had applied for a police permit to undertake the demonstrations and expected to receive police protection while using public thoroughfares. During a previous march into a Negro neighborhood, police protection was extensive and had included the use of helicopters. Rockwell had also made use of the mails. The dicta of Supreme Court decisions had considerably broadened the concept of state action to encompass situations where "the participation of the State was peripheral or its action was only one of several cooperative forces leading to the constitutional violation"135 and

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that the allegation of official action may charge "no more than cooperative private and state action."\textsuperscript{136}

The case of \textit{Collins v. Hardyman},\textsuperscript{137} in which the Supreme Court refused to extend relief under Section 1985(3) of Title 42, United States Code, to a political group opposing the Marshall Plan whose meetings had been broken up by the American Legion, is distinguishable. Mr. Justice Jackson limited the application of this section to instances involving state action, or the complete breakdown of state law enforcement, and construed the statute as falling into two parts: the \textit{first} defining punishable conspiracies, and the \textit{second} describing overt acts to make the conspiracy actionable. The overt act must be in furtherance of the limited conspiracy for the purpose of depriving any person of the equal protection of the laws or of equal privileges and immunities under the law. But he stressed, there must be an element of state action. However, Justice Jackson acknowledged that some private conspiracies could be of such magnitude as to come within the statute.

We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or equal privileges and immunities able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication. . . . But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens. California courts are open to plaintiffs and its laws offer redress for their injury and vindication for their injury and vindication for their rights.\textsuperscript{138}

The essence of Justice Jackson's argument is that, while Congress may give a right of action against individuals who conspire to interfere with certain federal rights, it did not do so because the qualifying word \textit{equal} presupposes state action.

A note in the \textit{Yale Law Journal}\textsuperscript{139} criticized the \textit{Collins} opinion by presenting legislative history indicating an intent by Congress for broader application to encompass private as well as state action and that the word \textit{equal} was added to limit the authority of the statute to the prevention of deprivations which attack the equality of rights of American citizens. Dicta by justices in subsequent cases appear to indicate that \textit{Collins} is of limited authority.\textsuperscript{140} Moreover, the action brought against

\begin{itemize}
  \item \textsuperscript{136} Id., citing Bell v. Maryland, 378 U.S. 226 (1964); see also Griffin v. Maryland, 378 U.S. 130 (1964).
  \item \textsuperscript{137} 341 U.S. 651 (1951).
  \item \textsuperscript{138} Id. at 662.
  \item \textsuperscript{139} Note, \textit{Federal Civil Actions against Private Individuals for Crimes Involving Civil Rights}, 74 \textit{Yale L.J.} 1462 (1965).
  \item \textsuperscript{140} Terry v. Adams, 345 U.S. 461, 481 (1953) (concurring opinion by Mr. Justice Clark); Monroe v. Pape, 365 U.S. 167 (1961) at 200-01 (concurring opinion by Mr. Justice Harlan).
\end{itemize}
Rockwell also invoked Section 1983, which is broader than Section 1985 (3). The elements for such an action include:

(1) That defendants conspired or acted jointly or in concert;
(2) that defendants acted under color of state law or authority;
(expressly set forth in statute) (3) a discriminatory intent . . . ; (4) that defendants subjected plaintiff (citizen or non-citizen) to a deprivation of a right, privilege or immunity (due process, equal protection of the law or equal privileges and immunities); (5) that overt acts were done pursuant to the conspiracy which damaged plaintiff.  

The complaint, a masterpiece of Kutner's draftsmanship, filed in the United States District Court, Northeastern District of Illinois, Eastern Division (Chicago), designated the Jewish War Veterans of the United States, Department of Illinois, and its Commander as the plaintiffs, with the American Nazi Party, World Union National Socialists, George Lincoln Rockwell, two other named associates in Chicago, and “500 more or less John Doe Storm Troopers of the American Nazi Party, and 1500 more or less John Doe Members of the American Nazi Party, and all other persons acting by, through or in their behalf” as defendants.

The American Nazi Party was organized by the self-styled fuehrer, George Lincoln Rockwell, the son of a vaudeville actor, educated at Brown University, and a Navy veteran. Failing to succeed at any occupation, he formed his organization in 1958 with national headquarters at Arlington, Virginia, and organized under the laws of Virginia. The organization received financial aid from certain wealthy individuals and had established branches in several cities throughout the United States, including Chicago. The complaint alleged that the defendants engaged in public demonstrations and meetings to incite riots and create disturbances of the peace, distributes nationally and internationally anti-Jew and anti-Negro hate literature containing depraved obscenities and vulgar racist deprecations, and makes public threats of exterminating and inflicting genocide upon the Jews and Negroes; and that the defendants were publicly dedicated to resurrect, by violence, the principles of National Socialism through its affiliate international organization, World Union National Socialists. The latter organization, also headquartered in Arlington, Virginia, was the international duplicate of the American Nazi Party and was also formed by Rockwell. In court testimony, Rockwell claimed that the only incorporated organization was the George Lincoln Rockwell Party and that the American Nazi Party is not “organized on paper.” He claimed to be the “Commander” of the latter by virtue of the fact that he organized it. There are no by-laws or rules. The second in command was Major Matt Koehl with Captain Ralph Forbes third in command.

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141. Hoffman v. Halden, 268 F.2d 280, 294 (9th Cir. 1959).
142. Civil Action No. 66 C. 1643.
the chain of command. Units were formed in other cities, subject to approval and screening by the National Organization.

The complaint alleged that the defendants "act individually and in concert with each other in pursuit of a common conspiracy under the name and style of the American Nazi Party and World Union National Socialists." The defendants were charged with acting contrary to their charter of incorporation, which asserts "the gaining of political power by legal means." The complaint further alleged that:

All of the Defendants, individually and in concert with each other, by agreement, common design or conspiracy, have been and are engaged in a program of disorderly public meetings and demonstrations, disseminating degenerate, obscene defamatory and threatening literature advocating the extermination or genocide of Jews and Negroes, all intended to subject and to deprive the Plaintiffs of their rights, privileges or immunities, secured by the Constitution and the laws of the United States. . . .

The complaint alleged that a proposed rally at the Chicago Coliseum and the demonstrations were intended to be in furtherance of the conspiracy. Reference was made to a tape recorded interview which was printed in the April 1966 issue of Playboy Magazine in which Rockwell expressed adherence to the principles of Mein Kampf, admitted publishing and distributing depraved and obscene hate statements, and having composed "hate-nanny" lyrics depicting the Negroes as an inferior race. The complaint further alleged that literature had been sent to Jews threatening them with death. The complaint alleged in part:

The Defendants, in defiance of the Constitutional rights and privileges of Plaintiffs and by their course of conduct and their announced rally on September 10, 1966, intend, under color of law of the statutes, ordinances, regulations, customs, or usage of the City of Chicago, Illinois, and the laws of the State of Illinois, to subject Plaintiffs, as citizens of the United States, to be deprived of their rights, privileges and immunities, secured by the Constitution and laws of the United States. That the conduct by the Defendants is purposeful and intentional.

The complaint sought a temporary restraining order and a hearing for a permanent injunction enjoining Defendants.

Appended to the complaint were two exhibits. "Exhibit 1" consisted of an announcement of a "White People's Rally" at a park in a neighborhood which had experienced violence and was to be followed by a "White March" into a "Black Neighborhood" and a rally at a hall in the evening. The leaflet referred to Rockwell as a man who is fighting "the black slum invasion of our neighborhoods" with calls to "demonstrate against the black animals who are trying to turn Chicago into a deadly and filthy jungle. . . . Then we will march on the blacks in their
neighborhoods with masses of ‘back to Africa’ signs. White Chicago will not tolerate any invasions of white neighborhoods by black scum.”

“Exhibit 2” was a comic book cartoon called “Here Comes White-man,” who is depicted as having replaced Superman and being endowed with super powers which are used in a duel with “the Jew from Outer-space” and “Supercoon.” Along with this was a cartoon entitled “Boat Tickets to Africa,” suggesting that “this ticket entitled one nigger to a free trip to Africa.”

The Court granted plaintiffs’ prayer for a temporary restraining order, ruled that the complaint was sufficient and the Court had jurisdiction, ordering the defendants to answer within twenty days. Rockwell appeared as his own lawyer claiming (or pretending) he did not have sufficient funds to hire counsel and that no lawyer in the Chicago area was willing to handle his case. However, the local chapter of the American Civil Liberties Union appeared as Amicus Curiae; and briefs and motions filed by them were adopted by Rockwell so that an argument could be made that the American Civil Liberties Union attorneys were representing him. Because officially he was not represented by counsel, the Court was induced to relax the rules of evidence to admit testimony and permit utterances which would ordinarily be excluded. However, Rockwell demonstrated legal knowledge and forensic ability in conducting his defense.

Testimony by Rockwell during the trial indicated that he had intended to march in Jewish neighborhoods to urge Jews to “cease supporting the Communist and Negro revolutionary movement” and to cease a campaign of “legal harassment” against him. Rockwell, in testifying on his own behalf, portrayed himself as a self-styled leader of the White race. Though Rockwell stressed that he did not desire violence but was organizing a march of tough white people with discipline required, the general pattern of the marches and the selected neighborhoods indicated an intent to actually create disturbances. Thus, the Court issued a temporary injunction enjoining Rockwell and his cohorts from marching on the Jewish New Year and Yom Kippur, the Day of Atonement.

Presiding Judge J. Sam Perry, an able and learned U.S. District Judge, in rejecting arguments of the Amicus Curiae attorneys as to free speech, held:

In my judgment, I have heard all of the evidence here. From the nature of the evidence that has been introduced here, this exceeds free speech. It amounts to an abuse of free speech. I think the evidence indicates also that it seeks to incite riot.

143. The distinction between amicus curiae and direct representation has become a matter of concern to the American Civil Liberties Union in cases concerning individuals accused of conspiring to counsel draft registrants to refuse military service and to violate Selective Service regulations. [March-April 1968 CIVIL LIBERTIES, 1]. Direct representation, as distinguished from amicus curiae, means that the attorney has full control in the handling of the litigation. [Comment by Oxfield, id. at 7.] Whether the Civil Liberties Union actually had this control in the Rockwell case is to be questioned. [See generally ACLU: Friend of the Court or Counsel to the Accused?, id. at 7.]
We have a corporation organized and existing in Virginia, coming here to Illinois without conforming to the laws of the State of Illinois, and setting up offices here and purporting to demonstrate. Certainly, that corporation which has never been qualified to do business in any manner, shape, or form in this State has no legal right here.

The thing that strikes me is that all the evidence indicates clearly to me that these proposed marches in the areas proposed definitely and deliberately are planned, and the areas chosen, for the purpose of inciting riots and for revenge, and not to accomplish any results, so far as the Defendants themselves are concerned, to satisfy their grievances.

If these facts were alleged as to some other organization hostile to the Christian organization about the Christmas holiday. I would take the same viewpoint about it. The same view I would take of a Mohammedan holiday, because our Constitution protects the right to worship as we choose, as to any religion.\textsuperscript{144}

Judge Perry further asserted:

I believe that the right to worship uninterrupted and undisrupted, freedom of religious worship, is just as valuable as the right to free speech, in my judgment.\textsuperscript{145}

The Court so held despite the fact that the proposed route of Rockwell's marches did not pass a synagogue, but synagogues were within the vicinity of the march.

The next step was to make the injunction permanent. The temporary injunction was extended so that, in effect, Rockwell was enjoined from demonstrating during the Jewish holidays of Succoth and Simchath Torah. Kutner further maneuvered for an order requiring Rockwell to produce records of the American Nazi Party and affiliated organizations. The defendant pleaded lack of time to amass his extensive records, and they were not produced. He pointed out that neither the American Nazi Party nor the World Union National Socialists was incorporated. Though there is private correspondence between Rockwell and leaders of Nazi parties in other countries, there have never been any meetings other than a gathering in England. The tenacity of Kutner's cross-examination of Rockwell produced more pay dirt.

Testimony by Rockwell revealed that the Party did not have a payroll, but that a savings account is maintained. Party functionings drew from the treasury sums needed for living. Rockwell reluctantly testified that the then current budget of the American Nazi Party was from thirty to fifty thousand dollars, although he was evasive on specific Party finances, and that the sources of funds were from contributions and the

\textsuperscript{144} Transcript, at 252-54.  
\textsuperscript{145} Id.
Rockwell refused to state the identity of his contributors, invoking "the privilege of freedom of association, free speech and the right of privacy" and "the Constitution and its Amendments against invasion, unfair and unreasonable invasion." He admitted receiving contributions from Texas, including assistance from two hundred contributors in Dallas. Rockwell admitted he stayed at the home of a Dallas resident who contributed $1,000 to $1,500. He then, under further questioning, stated he received in excess of $2,000, and that he received sums from this particular source for the past two years. He took the fifth amendment several times, particularly when Kutner tried to identify a certain oil tycoon contributor.

Another highlight of the proceedings was the testimony of Rabbi Mordecai Simon, Director of the Chicago Board of Rabbis, who was called as an expert witness by Kutner to testify as to the nature of the Jewish holidays and the location of synagogues. Rockwell wanted him to present a translation of the *Kol Nidre* prayer. Judge Perry ruled that this was unnecessary. Subsequently, a tape recorder was spotted on Rockwell's table, and its contents revealed a telephone conversation with a colleague in Virginia who read a translation of the *Kol Nidre* prayer. Rockwell attempted to use the old anti-Semitic technique of challenging a Jewish witness on the grounds that his oath is allegedly meaningless because the prayer announced a repudiation of all vows. As Rabbi Simon indicated, the prayer, composed in Talmudic times regarding Roman prosecutions, referred only to vows made between man and God and not between man and man. Rockwell and his supporters at the trial did not seek to hide their contempt of Jews, whom Rockwell referred to as a "raft of Communists."

Rockwell testified that he believed 80 per cent of the Jews could be convicted of treason. He admitted making statements that he would have to gas Jews if he became President of the United States, as he intended in 1972. Rockwell also testified that he did not believe that six million Jews were exterminated by the Nazis, claiming it was a hoax.

Kutner introduced published statements and interviews by Rockwell referring to the "six million barbecued Hebes," as well as other maliciously inspired attacks. His statements were clearly of a nature to incite a riot.

After considering all of the evidence and briefs submitted by the plaintiffs' attorney and the Amicus Curiae, Judge Perry granted a permanent injunction, the world's historic first against conspirators and a racist organization, holding that the first and fourteenth amendments as interpreted by the Supreme Court implicitly forbid individuals, associations or organizations, individually or by conspiracy, from prohibiting or interfering with the right of every person to exercise his own religious belief. This right is codified by Title 42, Section 1983, of the United States Statutes, which specifically provides for the recovery of damages.
Since interference with this right cannot be compensated by a remedy at law through compensation by money, such irreparable injury can be enjoined by a court of equity. Judge Perry stressed that:

this Court would restrain or regulate any kind of march, regardless of color or creed, if the same should be shown to be a violation of Constitutional rights of individuals that would result in substantial and irreparable damage or injury to persons or the community as a whole, and especially if it is shown that the purpose of such marches or demonstrations is to foment racial or religious discord under the cloak of the right of free speech and assembly or that, of course, there is likelihood of riot or disorder.146

Judge Perry further held that any individual or group of individuals or organizations or any representative of a federal, state or municipal government has standing to bring such action. The Court cited a previous decision in the Circuit Court of Cook County which restricted the demonstrations of Martin Luther King for open housing.147

Judge Perry’s historic decree enjoined and restrained the defendants from conducting or participating with one or more other individuals, in street or sidewalk marches, meetings, picketing or demonstrations at any place, within the Northern District of Illinois, Eastern Division, which is closer than one-half mile to a Jewish house of worship. The decree applies to an individual who is clothed in Nazi garb or can be recognized as a Nazi by means of party paraphernalia, who is carrying a Nazi placard or symbol, or appears with some form of vehicle or means of transportation which is decorated with Nazi signs, symbols of paraphernalia. The restraint did not extend to the mailing of literature.148

No appeal was taken from Judge Perry’s decision. Though Rockwell had indicated he did not desire to appeal the matter, the local branch of the American Civil Liberties Union offered to assist him. At the urging of the American Civil Liberties Union, Rockwell reluctantly agreed to file a notice of appeal along with a petition to prosecute the appeal in forma pauperis. Kutner then renewed an earlier motion for a subpoena duces tecum for the defendants to produce all financial records and membership lists to determine whether the forma pauperis affidavit was filed in good faith. This master maneuver put Rockwell in a precarious position. The defendants failed to appear on the date set for hearing by Judge Perry. Rockwell telephoned Kutner on several occasions complaining about the American Civil Liberties Union. The appeals were then dismissed, and the permanent injunction was made final.

The case is now a precedent in establishing the use of the provisions of the Civil Rights Act of 1871 in restraining the actions and conspiracies

146. Id.
by individuals and groups who seek to deprive or to subject to the depriva-
tion of others of their constitutional rights. The published memoran-
dum and order by Judge Perry is of great impact because of its succinctness without belaboring Supreme Court precedents. Though the case was unprecedented in that action of this type had not been brought pre-
viously, the opinion is a unique beacon light because of no reference to prior judicial trends. Doctrinaire civil libertarians may protest that Judge Perry's holding constitutes a delimitation of the exercise of first amendment rights. Such a position constitutes, what Sidney Hook has labeled, ritualistic liberalism—the reliance upon rhetoric rather than logic—slogans rather than the analysis of problems in defense of free-

dom. The activities of Rockwell and his so-called Nazi Party did not constitute free speech but a concerted conspiracy of promoting violence, the advocacy of murder and genocide, intimidation and ridicule in sub-
jecting minority groups to a deprivation of their constitutional rights. The framers of the first amendment and Supreme Court decisions have not condoned the use of speech to disseminate falsehood and defamation.

The doctrine of "prior restraint" is of limited application in this situation. A Court is not to be prevented from enjoining activities which lead to an infringement upon the rights of others. An injunction may issue as a remedy to protect individual rights and to enjoin that which is contrary to law. However, an impartial hearing must be held with all litigants presented with an opportunity to be heard.

Nevertheless, possible extended applications of this decision should be of concern to serious civil libertarians. Public demonstrations are a necessary means for the conveying of ideas, but all such demonstrations inevitably involve an element of social disruption infringing upon the rights of individuals and groups as well as upon the functioning of the community. The use of public thoroughfares inevitably involves police protection—particularly with regard to demonstrations by groups conveying ideas of public controversy. Thus, an element of state action is involved. Individuals and groups who believe the demonstrations would result in subjecting them to a deprivation of their constitutional rights could then obtain standing to commence a class action to enjoin such activities. The group involved might then be subjected to harassment from the mere bringing of litigation, especially if it lacks funds for retaining counsel and to pay court costs. Moreover, the rights of the group would be subjected to the subjective inclinations of the judge. If he were hostile

to the group's purposes, he might enjoin their activities upon the most limited finding of public disruption. According to the decision of the United States Supreme Court in *Walker v. City of Birmingham*, the group would be compelled to obey the injunction, regardless of its apparent illegality. It would be subjected to the expenses of prosecuting an appeal, and the delay caused by the litigation would in itself be an effective means for the restraining of freedom of expression. The timing of a demonstration is of importance as to its effectiveness; and when this is interfered with, the effect may be the same as total suppression.

Clearly, the Rockwell precedent should be limited to the facts of that particular case. The failure of an appeal was unfortunate in that a higher court might have set forth stricter judicial guidelines. The precedent should not be invoked to enjoin demonstrations and activities by groups to ventilate ideas seeking social or economic reform, rights for minority groups of international peace, though a governmental unit might reasonably regulate such activities with regard to time and place. The mere fact that a demonstration may cause the presence of a crowd, an angry reaction, or a certain amount of social disruption should not justify the issuance of an injunction. The preferred position of the first amendment means that some potential infringement or deprivation of human rights does not justify restraint. Even demonstrations expressing opposition to religious beliefs are to be permitted.

However, where a group, like the American Nazi Party or the Ku Klux Klan, seeks to use the techniques of public demonstrations as part of a conspiracy and concerted plan of action to deprive political, economic, ethnic or religious groups of their rights under the Constitution or subject individuals or groups to threats of deprivation, the Rockwell precedent may properly be invoked, but only to the extent where, in fact, such activities do interfere with an individual's or group's civil rights. Sections 1983 and 1985 and the Rockwell precedent may be properly invoked by Negro parents to protect their children from picketing or other forms of intimidation when attending certain previously segregated schools or by Negroes seeking to reside in certain neighborhoods.

In the *Rockwell* case, the use of the injunction under Sections 1983 and 1985 proved to be effective in thwarting activities calculated to create a tense climate of racism. Whether other methods, such as counter-demonstrations, would have been preferable or more effective can now be only a matter of speculation. The injunction may well have been a contributing factor in the ultimate dissolution of Rockwell's movement, though his assassination by John Patler, one of his henchmen (ironically, a defendant in the case), was undoubtedly the ultimate blow.

Nevertheless, the seeds from which racism may germinate still flourish within American and international society; and legal weapons, like the Rockwell precedent, remain as a part of the arsenal. Clearly, the advocacy and promotion of belief in genocide and hate do not have any redeeming social significance nor contribute to the marketplace of ideas in a free society. Rather, such blatant racism may be regarded as an aspect of hard-core pornography. The symbol of the swastika and the death camp tortures are portrayed along with sexual orgy and sadism as a prominent part of such literature in appealing to prurient instincts and to a blatant desire of violence for its own sake.\textsuperscript{159} The appeal of Rockwell was precisely to these instincts, particularly among college students who sought to hear him for "kicks." Rockwell's appeal for recruits, however, was to those elements within American society who have limited education and find themselves drifting without social purpose, like the motorcycle gang. Movements like Rockwell's American Nazi Party provided them with a psychological outlet. They are particularly susceptible to the themes of sex, sadism and violence as portrayed by obscene literature.

The Courts have recognized that obscenity does not enjoy first amendment protection,\textsuperscript{160} so that hard-core pornography may be regulated. It is suggested that the writings and utterances of racists like the late George Lincoln Rockwell may also be regarded as hard-core pornography. Nevertheless, the needs of a free society require that such restrictions be carefully applied.\textsuperscript{161}

Legal redress, however, can only attack the symptoms of racism. The ultimate solution lies in attacking the underlying psychological and sociological tensions which give rise to these ugly manifestations. This requires an evaluation of basic social norms and an attack on social problems, such as the frustration of the inhabitants of ghettos, the economic insecurity of the middle class, the tensions of international conflict and the distrust generated by the credibility gap, and the problem of giving meaning to human life.

Kutner, as an advocate preoccupied merely with seeking legal redress in this instance, was precluded from giving attention to these underlying problems. Perhaps, however, these are matters for specialists in other fields. Kutner has long urged seminars to distill all problems of this ever present vexatious subject.

CONCLUSION

Luis Kutner's writings and cases demonstrate how an advocate may function as lawmaker. However, in representing a client, Kutner, as any

\textsuperscript{159} Davidowitz, Smut and Anti-Semitism, 14 MIDSTREAM 71 (1968); Davidowitz, \textit{Intergroup Relations and Tensions in the United States}, 68 AM. JEWISH YEARBOOK 69 (1967); Steiner, \textit{Pornography and the Consequences}, ENCOUNT, March. 1966, at 46-47.


\textsuperscript{161} Luros v. United States, 389 F.2d 200 (8th Cir. 1968).
other advocate, must limit the breadth of the issues presented to the court so that the best interests of his client will be served. His primary obligation is to serve the client, with considerations as to the making of law becoming secondary. Nevertheless, in his capacity as advocate he presents perspectives which the judge would otherwise ignore in making a decision. The advocate's role clearly has an institutional function within the judicial process. But the judge arrives at his decision within the institutional context. Though ideological preconceptions influence judicial decision-making, there is an element of fluidity as judges, especially on the Supreme Court, change their minds within a situational context. Kutner, as all other advocates, assumes a role in the judicial process by contributing to the situational context.

The advocate as writer is freer to contribute to lawmaking. Kutner, in his pioneering institutional writings, does not have the obligations of immediately serving the needs of a particular client and is, therefore, within a more flexible position in raising issues affecting the course of lawmaking. His writings contribute to the ferment of legal opinion-making to be invoked by judges as part of the reasoning in the decision-making process within situational contexts as they arise and by legislators in considering legal reform. Kutner's prescriptive creative writings, in the area of international law, contribute to a ferment for the international decision-makers in vindicating the rights of the individual in international law. Here, too, a ferment is created for at least quasi-judicial decision-making in situational contexts, such as the detentions of Cardinal Joseph Mindszenty, William N. Oatis and Moise Tshombe and in tending to be established as a subject rather than object of international law.

In addition to his function in contributing to the making of law, the advocate, as demonstrated by Kutner's career, also assumes a role analogous to that of the Ombudsman, an institution established originally in the Scandinavian countries which has been adapted in other legal systems for providing a check upon arbitrary bureaucratic action. The formalization of judicial and administrative procedures leads to a depersonalization of the bureaucratic process. The advocate, acting independently of the formalized processes, is able to focus upon the individual case and to restore the personal element to the governmental process. In representing his client, he focuses upon the arbitrary result of certain cases, such as in the Stephens case and thereby causes the rectification of a wrong and the adoption of new rules to avoid the perpetration of future wrongs. The advocate, in representing his client to right an injustice, may also resort to informal or extra-legal procedures, as in the Boyd case, where the withdrawal of the Petition for a Writ of Habeas Corpus resulted in the release of the accused through personal contacts by the

federal and state members of the judiciary. However, it was the advocate's initiation of the action which was the catalyst.

Cases of the type handled by Kutner (and other advocates) clearly demonstrate the need for the establishment of the institution of Ombudsman within the governmental process, to act as an independent check upon arbitrary administrative and judicial action and to restore the personal element to the administrative process. The individual who is wronged should have ready recourse to such an Ombudsman. To rely upon the chance intervention by an advocate, like Kutner, to eliminate injustice provides a backstop of only limited effect. However, even the establishment of the Ombudsman will not eliminate the role of the independent advocate whose purpose will still remain to supplement such governmental functions. Moreover, the Ombudsman, as a governmental institution, may itself become bureaucratized and impersonal. The independent advocate would then emerge as a check.

The confines of this paper do not permit a consideration of the advocate's personality structure, and the full Kutner personality cannot justly be considered in this résumé. Nevertheless, the effectiveness of the advocate depends upon his personal traits. To some, Kutner may appear to be arrogant and egoistic. But these are traits required by an advocate who must have confidence in his abilities and legal reasoning and creativity. Indeed, when Kutner represents a client or champions a cause, he becomes obsessed with the task, assuming a stance of self-righteousness. He becomes indignant with those standing in his way who fail to see the righteousness of the cause, such as a man wrongly convicted or a child arbitrarily taken from his parents. He exerts all his efforts to see that justice will prevail, despite the obstacles in his path. To Kutner, where the sense of injustice collides with intrenched legal principles, the latter must give way.

Kutner approaches his causes with the flair for the dramatic. He has many of the attributes of an actor, and indeed has persons associated with the theater and other entertainment media as his clients and associates. However, law itself is similar to the theater with the advocates as actors in the judicial process seeking to influence the judge and jury who comprise the audience.

As the advocate influencing judicial decision-making, Kutner exemplifies the highest courage and persistence and skill to swim against the current. Once having chosen his aim, he expends himself recklessly upon it in search of a moral legal order based on individual judgment and individual responsibility.

Visionaries like Kutner profess to become adept at institutional manipulation, expending enormous power of fashioning good from evil. Kutner's mind cannot support legal-moral chaos for long. He is under strong compulsion to improvise or invent a legal-ethical setting for disruptive behavior. He seeks to erect new cosmogenies out of the archaic
ruins of sterile social systems. His macrocosmic writings profess to be realistic and concrete creations of a world view for future generations. Being fundamentally informed of an accurate picture of the society in which he lives, his contributions are unequivocally humanitarian. He decries the faults and weaknesses of society. He strives to mitigate the domination of man by men. To him the life of a nation, the world, or of a man depends upon the competence of the cosmos concept of the Rule of Law.

The expanding influence of Kutner's innovations, catalyzing other pioneers, will enable man to develop his personality and to order his own life. To Kutner, the _societas perfecta_ cannot be achieved by merely acknowledging human rights and fundamental freedoms in fine-sounding words in national constitutions and international declarations and conventions. Word-phrases, evolved into principles, must be applied in behavioral legislation and legal practice in a manner permitting man, as a rational being, to freely develop his personality, to exercise his rights, and to order his own life.

The rule of life must be in balance with the rule of law.