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ECONOMIC AND SOCIAL RIGHTS TO HEALTH

An Interdisciplinary Discussion Held at Harvard Law School in September, 1978

Economic and Social Rights and the Right to Health

An Interdisciplinary Discussion
Held at Harvard Law School in
September, 1993

Organized by the
Human Rights Program
Harvard Law School

and the

François-Xavier Bagnoud Center
for Health and Human Rights
Harvard School of Public Health

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The Harvard Law School Human Rights Program, founded in 1984, fosters coursework, the participation of students in human rights activities, assistance to the worldwide human rights community, and research and scholarship. Through its student summer internships with nongovernmental organizations, its visiting fellows who spend from two to twelve months at the Law School, its visiting speakers, its applied research, and its clinical work, the Program forges cooperative links with a range of human rights workers and organizations from all parts of the world. It plans and directs international conferences and retreats on human rights issues, and publishes its reports and analyses. A brochure describing Program activities, including opportunities for visiting fellows (activists and scholars), is available on request.

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The François-Xavier Bagnoud Center for Health and Human Rights was founded at the Harvard School of Public Health in January 1993. The Center considers that the promotion and protection of health and the promotion and protection of human rights are inextricably linked, and is dedicated to exploring the conceptual dimensions and practical applications of this critical relationship. Through its concentrated focus on the intersection of health and human rights, the Center also seeks to help revitalize the field of public health and broaden human rights thinking and practice. The Center has a program on research, education and advocacy on health and human rights issues. The Center also publishes *Health and Human Rights,* a quarterly international journal which features in-depth articles, brief reports on important developments, and selected book reviews illustrating the critical relationship between health and human rights. The Center was founded with a gift from the Association François-Xavier Bagnoud which currently supports programs in humanitarian assistance, aerospace research for the benefit of people, and community life in the Swiss canton of Valais. Its humanitarian assistance projects focus on children's rights—especially the right to health care—and children who are orphaned, abandoned, or sick, many of whom have AIDS or are HIV-infected. For further information, please contact the Center.

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Preface

This distinctive venture grew out of discussions among Philip Alston (Professor at Australian National University), Jonathan Mann (Professor at the School of Public Health and director of that school's François-Xavier Bagnoud Center for Health and Human Rights), and Henry Steiner (Professor at Harvard Law School and director of that school's Human Rights Program). The Human Rights Program and the Center for Health and Human Rights took responsibility for organizing and providing funds for the meeting. The Human Rights Program prepared this publication.

Our purpose was to bring together a small number of people who had given sustained thought from different perspectives to issues of economic and social rights, in some cases particularly with respect to health and health care. The participants noted in Annex A were drawn from academia (law, medicine, public health, political and moral theory, economics, sociology), from intergovernmental and governmental institutions, and from public health officials. No formal papers were presented; the participants engaged in a roundtable discussion about the themes outlined in advance of the meeting by the organizers. Three interactive sessions of three hours each explored such issues in an effort to clarify and generate ideas that could be helpful to others who were concerned in practical and theoretical ways with economic and social rights and with health. Hence this publication, which the two organizers are distributing without charge to concerned individuals and institutions worldwide.

The first session explored basic questions of conceptualizations of economic and social rights and the efficacy of different strategies for their realization. The second session applied such considerations to the field of public health. The third session concentrated on the role of economic and social rights and institutions in the international human rights movement, as well as on suggestions for programmatic development of these rights. Throughout the three sessions, health and health care remained the primary illustrations of economic and social rights.

The topics addressed by the participants during the nine hours of discussion include the following principal themes:

> the power and the failures of rights rhetoric and argument, relative to other modes of argument (distributive fairness, utilitarianism, and so on) about governmental provision of welfare;

the revision and transformation of rights rhetoric to accommodate complex economic-social rights like health or health care;

narrow-to-broad conceptions of and different frameworks for realizing a right to health and health care;

types of legal and political processes essential to the realization of rights like health or health care; and

the influence of the international human rights movement on national reforms, and the failures of that movement and its related institutions.

Each participant had the opportunity to review and correct an earlier draft of this publication, to be certain that its text accurately sets forth participants' views expressed during the discussions. That text considerably shortens the transcript of the three sessions, so as to present what we believe to be a readable and cogent exchange of views. The editing and shortening of the transcript benefited greatly from the exceptionally able help of Michael Jasny, J.D. '94.

Jonathan Mann
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Henry J. Steiner
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Glossary

Institutions

NGO: Nongovernmental human rights organization
IGO: Intergovernmental human rights organization
Committee: The Committee formed under the International Covenant on Economic, Social and Cultural Rights

Covenants

International Covenant on Economic, Social and Cultural Rights entered into force 1976; 117 parties as of 1993; set forth in U.N. Doc. ST/HR1/Rev.4 (Vol. 1/Part 1), *A Compilation of International Instruments* 8 (1993).

International Covenant on Civil and Political Rights; entered into force 1976; 114 parties as of 1993; set forth in U.N. Doc. ST/HR1/Rev.4 (Vol. 1/Part 1), *A Compilation of International Instruments* 20 (1993).

Session I

Applying Rights Rhetoric to Economic and Social Claims

Henry Steiner (chair)

The rhetoric of rights permeates many contemporary political and social movements. One purpose of this discussion is to probe the often confusing claims of rights in a particular field—economic and social rights as applied to health or health care—and to suggest approaches to rights rhetoric as well as alternatives to the development and application of such rights.

Let me recall some ways of thinking about economic and social rights that might inform our discussion. I start by noting questions traditionally asked about rights in general. Are they legal or moral in character, or both? Are they applicable within a state only as made so by that state, or are they part of universal human rights in a way that binds all states? Our discussion might also consider the familiar dichotomy between economic and social rights and civil and political rights, the relation of rights to remedies, the role of courts in the development and application of rights, and so on.

An alternative approach open to our discussion would address the character and force of "rights" as a foundation for a legal order and as a spur to political action. Is rights rhetoric helpful or, at least in some respects, hurtful to such progressive causes as health care or education? Is rights-based argument apt to be particularly effective politically, to serve as a distinctively effective mobilizing strategy?

Following a third route, we might question the rapid extension of the rights tradition in liberal democracies to economic and social programs. Throughout this century, liberal societies have moved by an internal dynamic toward some version of the welfare state; their progress is complemented on the international level by a major treaty, the Covenant on Economic, Social and Cultural Rights, to which over 120 states are parties. The tendency to extend the language of rights grows ever more pronounced. But are there more effective modes of argument than rights to advance the cause of welfare provision in fields like health, food, and housing?

We might discuss each of these possible issues within a national (say, U.S.) context, in a comparative context that could include states as diverse as Zimbabwe, Pakistan, and Peru, or within the framework of international norms, processes, and institutions.

In this diverse group, participants will doubtless draw on many

of these different approaches for clarification of our present circumstances and possibilities. Nothing is ruled out. But certain phenomena are necessarily "ruled in." Rights argument and advocacy are prominent phenomena of the modern age, forceful in political fora and in academia, in national courts and in intergovernmental organizations. The traditions of liberalism and welfare statism or democratic socialism have been enriched and expanded by an international human rights movement.

Nonetheless, we must examine the nature of our commitment to human rights-based argument. Are rights in themselves the abstract object of our devotion, or are we so attentive to rights because they serve a desired social end—in the context of this meeting, the alleviation of poverty and illness and other distress? If our commitment to rights arises out of our humane concerns about the object of these rights—such as good health or health care—then we should feel free to eschew rights rhetoric for other serviceable forms of argument: theories of political community, of distributive fairness and social justice, or of maximizing utility. The goal is essential; how we reach it, through what languages or types of advocacy, becomes secondary. Don't we often attach rights language to claims or goals that we have defined and persuaded others to work for by other means?

I've asked Martha Minow and Ken Anderson to launch our discussion with some general comments.

Martha Minow

Let me begin with a crucial distinction in social theory: the distinction between the top-down welfare hand-out and bottom-up social empowerment. With this distinction in mind, I wish to raise three difficult questions for this group to consider.

First: How can we successfully frame a human right that is conditional on material resources for its fulfillment?

Second: How can we frame a human right that both promotes social interdependence and ensures individual entitlement?

And third: How can we frame a right that is at once universal and responsive to the ineluctable differences among people in terms at least of age, gender and cultural traditions?

In addressing the first challenge (framing a right that is conditional on material resources), we should first dismiss the old canard about civil and political rights. It is supposed that these rights are higher, more exalted, than economic and social rights. As restraints on action, rather than mandates for positive action, they are the bare essentials of humane government. In fact, the political and civil "core" of rights requires positive action and material re-

sources for its implementation. For this and for other reasons, the distinction between civil and political rights and social and economic rights has been demolished.

How we frame a right will determine the commitment of resources. Consider the right to health care. It has multiple meanings. One might say that it restrains government from infringing on the health of its citizens—in the traditional liberal discourse, a kind of "negative" right, keeping hands off. This is the standard we impose on private actors in their relations with others. Or, one might say, the right to health care compels the government to some minimal action, such as provision of care to the impoverished. Or, the right to health care demands extensive action by government, such as the development of adequate housing or food distribution that bears directly on health,or the empowerment of individuals to make decisions about their own health.

Consider my second question, about interdependence. In this country, there is talk of zero-sum gains and the rationing of health care. That is what the resources debate has led to. If we are to have a more fruitful discussion, our rights rhetoric must incorporate the notion of social interdependence. A healthy life depends upon human interdependence: the quality of air, water, and sanitation, which government maintains for the public good; the quality of one's caring relationships, which are highly correlated to health; the quality of health care informally provided by family and friends. Interdependence is not a social ideal, but an inescapable fact; the scarcity of resources forces it on us. Who gets to use dialysis equipment? Who goes to the front of the line for the kidney transplant?

In approaching these questions, which are consuming questions for bioethicists, our traditional rights rhetoric has been unhelpful. Rights rhetoric revolves around the individual, the bearer of the right; it doesn't help us in allocating resources or adjudicating between competing rights bearers. Its individualism paralyzes us and frustrates dialogue, and so we begin to gravitate toward utilitarianism, which speaks to the general good. But isn't there a way to fold within rights discourse a concern for the interests of others? And isn't there an alternative to the decision-making process that the current rights rhetoric implies, an alternative that is inclusive and communal rather than adversarial and adjudicatory?

My third question concerns the putative universality of rights. If it is necessary that we respect others and their needs, then rights advocates are faced with a conundrum. People are different—we cannot escape that fact—but rights are universal. How do we frame a right that at once rejects the harmful constructs of culture and tradition and respects the genuine differences among people?

Suppose we take equality as our standard, our basic commit-

ment to human rights. In a roomful of people with different needs, it is difficult to define equality. Equality of expenditures will not provide people with the same degree of benefits. Given the scarcity of resources, equality of outcomes may be an impossible goal.

The gender issue exemplifies the conflict between universality and difference. It is difficult to distinguish the fact of difference between the genders, which we must acknowledge and accept, from the ideology of discrimination. Consider an example from American jurisprudence. The Supreme Court of the United States has held that pregnancy is not a condition of gender, for not all women are pregnant. As a consequence, discrimination based on pregnancy—such as denial of employment—is not subject to the higher standard of judicial scrutiny that the American Constitution sometimes requires. I believe this is a wrong decision; still, the issue is difficult. Perhaps the Supreme Court did not wish to condemn women to their accustomed separate role.

Michael Pernick's wonderful book, *The Calculus of Suffering*, provides an outrageous example of ideological discrimination. In the nineteenth century, when anaesthesia became widely available in the United States, doctors gauged a patient's dose by gender and race. The doctors believed that women required a higher dose than men, for they were delicate creatures and could not handle pain; people of color, who did not experience pain, could go without an anaesthetic. Today we are appalled by such views treated then as matters of expertise. We can see the biases of the past better than the biases of today. By using universal rights to root out the biases, do we only perpetuate another bias, a conception of rights that takes for its model the white, able-bodied man?

The questions I have posed reflect my own assumptions. Let me state the ones that I have come to recognize.

First: Rights are a meaningful rhetoric for discussing society's response to human needs.

Second: Rights rhetoric is more than aspiration. It is a commitment to some degree of action.

Third: The realization of rights comes of complex negotiations among different kinds of rhetoric, among political movements, among public and private institutions. It comes of consciousness-raising, individual empowerment, political work, working within and against the status quo.

Fourth: Rights advocates should concentrate their efforts on the most vulnerable and disadvantaged, yet strive for some vision of universality. That's a tall order, I know.

Fifth: The misallocations in health care and medical research deserve our attention.

Sixth: Ultimately, rights are about attention: formal attention,

informal attention, the attention of various communities, one's attention to oneself. Whose pain and suffering deserves attention?

Hannah Arendt, whose work I deeply admire, would disagree with much of what I've said. She would insist that human suffering should not be a subject of public debate. The proper subject for us, she would say, is human *flourishing*. This is a sobering remark. It may well be that we would arrive at a different rhetoric, a better one, if we made human flourishing our starting point. A rhetoric of empowerment to replace a rhetoric of hand-out. But then perhaps rights can achieve empowerment.

Ken Anderson

Martha Minow has given us a rich introduction. I will make some brief remarks.

It struck me forcibly the other night, as I was bathing my ten-month-old daughter, that health care is (or should be) fundamental. It is a necessary provision of a just and good society. Perhaps this claim is best expressed in the rhetoric of rights: the right is a basic term in our political parlance, and, as Americans, we are apt to invoke it. There are alternative rhetorics, however, which may better describe my claim and, in the end, may prove more useful in realizing it.

In his defense of equality in *Spheres of Justice*, Michael Walzer renounces the language of rights, for he has observed that rights tell us little about matters of distributional fairness. To say that one has the right to an equitable distribution of resources is to say, as he recognizes, very little. The alternative language that Robert Cover finds in Judaism, a language of incumbent obligation, or "duty," is better suited to the ideal of distributive equity.

Other frameworks deserve consideration, too. In Rawlsian theory, the allocation of resources is properly decided from behind a "veil of ignorance," where we are temporarily ignorant of our actual status in society. In this position, the rational actor, who need not possess a sense of obligation toward his fellows, will bargain for some form of social insurance. Finally, we might consider the rhetoric of the New Democrat, who speaks of health care reform as an intelligent investment.

With the exception of the last, each of these languages appeals to me more than the language of rights. In the context of health care, the claim of right is both vacuous and obscurantist. It is vacuous because, once made, it is subject to eviscerating qualification: *Yes, you do have a right to health care, but within the resource constraints of this society.* It is obscurantist because, being a rights-as-trumps discourse, it forecloses further discussion, which the issue of health

care demands. A strong claim of right may bring us to a wrong distribution of resources, a substantively unjust result, such as in the areas of women's health that Martha Minow mentioned.

Of course, the weakness of rights talk on health care is its strength on such incontrovertible issues as torture. If someone wished to torture my neighbor, I would want to stare that person down: *This is not a matter for complex negotiations. We are going to end this discussion now, in the name of his rights.* The claim of right, similar to a trump card in bridge, is inappropriate to the discussion of health care.

The social empowerment of which Martha Minow spoke is less a question of rights than a question of obligation toward each other than we should observe. The beneficiary's gratitude to his benefactor expresses itself in a new obligation to leave the door open for someone else. This reciprocal relationship, gratitude and obligation, possesses great power. I feel its force in my own life. When my mother died earlier this year, after a year's struggle with cancer, I sat at her bedside and thought about the many people who were engaged in her care. She had seven children, and all came at one time or another to help care for her. We were there for the very reasons that Martha mentioned: a sense of family participation, of love, and all that such feeling embraces.

It must be said, however, that obligation carries us only so far. In a very short time, seven close and committed children were exhausted by the demands of health care for their terminally ill mother. Direct personal obligation ran out of steam, and the alternative health care provider, the hospital, would not treat my mother out of obligation. To bring the hospital into the picture, we needed a new language, that of purchasers and vendors, of contracts and formal, legal rights. At the most abstract level of social interaction, among people who share only a common membership in the larger society, even this language will not suffice: the notion of social insurance, including the special legal obligations that stem from it, is the only one that really engages us.

But the language of obligation is, I think, the most important, and the focus on rights and the use of rights rhetoric obscures it. I would encourage us to move beyond rights into these other discourses.

Keith Hansen

Ken, I believe that you went half a step too far in your assessment of economic and social rights. It is true that these rights are often subject to severe qualification, as in the human rights treaties declaring them. But I read these qualifications as tokens of the youth and immaturity of economic and social rights, rather than as signs

of structural weakness. The problem is, we have not learned to sever the more difficult and polymorphous aspects of these rights from their core elements.

Ken Anderson

In making my point, I had in mind the discourse of rights in the United States, where it is virtually exhausted. In developing countries, by contrast, the discourse may still be young and full of possibility.

Philip Alston

In my experience, the disparities in rights discourse within and without the United States pose an enormous difficulty for human rights debate. In 1984, when I first taught at Harvard Law School, I was staggered by the obstacles to a useful discussion of economic and social rights. Americans have such preconceptions about this category of rights! They can't get past conceptual issues to reach the vital practical ones. Furthermore, the cautious and suspicious American attitude toward communitarianism does not hold for the rest of the world. For example our colleague Albie Sachs's ideas about participatory institutions, which appeal to many of us around the world, are unacceptable to Americans.

Michael Mandler

I want to add an economist's perspective to Ken Anderson's critique of rights rhetoric. Rights talk makes economists uncomfortable. They are troubled by the power of rights to make uncompromising claims on resources, to set priorities for social expenditures and the redistribution of goods, regardless of the economic reality of scarcity. Such decisions must, of course, be made, but does rights talk provide the best vocabulary for ranking priorities? In fact, the rights approach can, at its worst, discourage reasoned discourse and degenerate into alternating assertions and denials. I say, "all citizens have a right to health care," while you say, "citizens have no such right." Is there anything to be learned from such exchanges?

On the other hand, I do not entirely reject the rights vocabulary. Even if it is not an ideal form for public debate, it is at least a beginning.

Larry Gostin

Yet civil and political rights are as reckless (in economic terms) as social and economic rights. Both categories have economic costs and impose human burdens; they raise discussions, create conflicts,

and force negotiations. Generally speaking, rights are about the reconciliation of complex differences, and if we appreciate the value of civil and political rights, we should recognize the potential utility of social and economic rights.

June Osborn

I want to speak to another of Ken Anderson's points, his use of the characterization of rights as trump cards in bridge. My experience does not support that characterization. In our public discourse, rights do not win the game: they buy time. When I speak about AIDS issues to CEOs and civic leaders who lack a technical background in medicine, I am careful to mention rights. For a moment, they feel personally concerned, although they neither have the disease nor practice medicine. Rights talk buys ten minutes of their attention. I use it like a magic wand.

Martha Nussbaum

To leave the subject of rights for a moment, I would like to return to the related subject of equality, which Martha Minow raised.

In the debate over the meaning of equality, there are supporters for three positions about what the political goal should be: equality of access to resources, equality in the satisfaction of individual preferences, and equality of capability to function. The second conception of the goal, equality in the satisfaction of preferences, is unacceptable. Deprivation, ignorance, and social inferiority lower one's expectations; one hasn't even the glimmer of something better, and one demands less.

The liberal alternative, which would provide equal access to resources, falls short in other ways. It ignores the variation in people's actual needs, especially the greater need of the persistently deprived to overcome deprivation. A physically handicapped person, for example, may have a greater need of government resources to achieve the same degree of mobility as others.

I myself would favor the third option, equality of capability to function. If we now return to rights, thinking of this debate as a way of fleshing out the content of the notion of a right, the individual would have the right to a particular state of health, rather than the right to command particular health care resources. The practical differences between the two may be quite subtle, and the rights debate needs to make advances in order to understand them. But I do not recommend that we discard our rights rhetoric for something new. Individuals have claims to make against society, and rights are the marks of their claims. We simply need to give rights talk more determinate content, by bringing it into relation with this debate.

Harvey Fineberg

The standards of capability of which Martha Nussbaum has spoken are open to still further complication and refinement. In the case of health care, for example, what is the proper standard of functional capacity for women, a historically neglected group? Is it equivalent to the male standard? Or is it the level of good health that women might have attained, had their needs not gone unnoticed?

I would also like to pose a question that was implicit in Martha Minow's and Ken Anderson's introductory remarks. We seem to agree that in traditional rights rhetoric, there is a difficult tension between the individual and the community. Ken would use an alternative rhetoric, the idea of obligation or social responsibility, to resolve the tension. What about group rights? Might they provide a useful alternative?

Martha Minow

I'll address one aspect of that question: the utility of individual rights rhetoric in the distribution of benefits.

The child immunization programs in this country are less than perfect. Even with improved delivery systems, some element of voluntary compliance will remain. Suppose the government goes so far as to send doctors to the home. The doctor arrives at the front door, ready to administer a vaccine. Even then, the vaccination program may fail. The child's guardian may tell the doctor: "Nice to see you, doc, but I do *not* consent to this treatment for my child."

How do you elicit the guardian's consent? Neither rights nor duties are very helpful here. The relevant issues here are culture and understanding—in a word, trust; and neither rights rhetoric nor duties rhetoric easily induces trust. Perhaps the government must persuade the guardian that it is in her interest to participate in the program. In that case, it may wish to pair the vaccination with a more acceptable, a more direct and unambiguous benefit. Rights rhetoric is useful in describing the benefit. If the guardian has an obligation to immunize her child for admission to daycare or school, she also has the right to an eye exam or ear exam for the child, an obvious benefit.

The duty of caring for others, such as the parental duty to care for a child, appropriately complements the right to receive care, as in a right to health care benefits. Rights rhetoric alone is insufficient, even in the context of immunization (which all of us accept as an unequivocal good). To build trust, the government must develop a system of delivery that is inclusive, a system in which individuals

feel a personal investment, a system in which the government is not an alien, controlling service. The lesson for us is neither "rights" nor "duties," but *education.*

Martha Nussbaum

I am troubled by one aspect of Martha Minow's observations. There are many places in the world where the interests of the community and the family are arrayed against the female child and her right to basic health. I would say: No, that little girl has a human right. When we focus on communal preferences, even the preferences of the smallest, closest community, the family, we tend to lose sight of the individual's right.

Martha Minow

I am deeply concerned with the problem just mentioned. When I talk about trust, I don't mean to valorize the preferences of the community nor to treat some in the community as irrebuttable speakers for all. I simply mean to ask the practical question: how can the parents of that little girl come to accept the service providers as something other than a threat, so that she can receive the medical care to which she is entitled?

June Osborn

Indeed, there is terrible mistrust of the United States government—especially among Afro-Americans—on the issue of AIDS. A stunning number of people believe that the government *created* the virus. Without trust, no government program, however well intentioned, will successfully treat and cure patients and eradicate the disease.

Larry Gostin

In the context of Martha Minow's observations about immunizations, I would like to restate my earlier position: there is no meaningful difference between civil and political rights and social and economic rights. Society can impose a duty on the guardian to immunize her child, despite the guardian's civil right of autonomy in her affairs. On the other hand, a guardian in this society cannot claim an economic and social right to the child's immunization. What is the difference between the civil right claim and the social right claim? They both concern the assignment of burdens between the individual and society.

Ken Anderson

Yet in reducing rights talk to the assignment of burdens, we should be very careful to preserve the essence of the rights claim. While both the individual and society may have burdens, neither one need have a legitimate claim of right. Society needn't justify its actions in the language of rights; it can rely on the simple power of the community to direct resources toward the greatest good.

America has legalized the language of rights. If we are tempted to find rights in everything, it is because rights are deep in our experience. Our statutes reflect this experience: the embodiment in the language of rights of complex negotiations among competing claims. Perhaps the economic and social rights of international law are like the unfunded federal entitlements in the statutory law of the United States: aspirational, to be negotiated.

I wonder whether an alternative rhetoric of obligation would produce a different allocation of the burdens. In the *health care* debate, rights rhetoric seems better suited to the equitable consumption of health goods. If one has an automobile accident and breaks his arm, he may assert his right to particular medical services. Duties rhetoric seems to suggest a broader notion of *public health* that emphasizes preventive medicine. Society has an obligation to immunize its children; it has an obligation to provide clean water and protect the individual from environmental hazards. The language of rights leads to a dyadic scheme of medical consumption; the language of duties leads to a more diffuse scheme of public health.

Karl Klare

Whatever our disagreements, there is a lot of common ground between us. Everyone agrees: rights discourse is energizing, mobilizing, and emotive, and we probably can't understand our own political culture without the idiom of rights. No one would seriously propose that we forget about rights and try something new. At the same time, we believe there isn't terribly much content to the idea of rights. The right partakes of the fundamental: it signals great priority and power in this society. But it says little else.

In applying rights rhetoric to a practical problem such as health care, we find ourselves at an impasse. The application of rights requires an animating theory—a political, philosophical, or ethical theory that is external to rights discourse. The reliance on an external theory is problematic for us. First, it undermines our attempt to answer one challenge of this discussion: the sensitization of rights rhetoric to communal and social claims. If we must step outside of rights discourse to accomplish that task, we have a problem. Second, it undermines the very aspect of rights discourse that attracts

us to it: its claim to universality, its power to trump. If we announce to the world that rights are without content, that what we ascribe to rights belongs in truth to political theory, we compromise the emotive power of the discourse.

This is my challenge: Can we identify any substantive content to rights, other than priority and power? Do rights put us on firm ground to begin the task of political theory—or must we frankly acknowledge that the rights game is merely ancillary to the real intellectual enterprise?

Albie Sachs

I want to describe the rights debate in my home country, South Africa, where we with a radical past are trying to ascertain the value of rights for the transformation of the country. I am especially interested in Roberto Unger's thoughts, for my remarks will be an implicit challenge to him.

The rights debate is taking place on two fronts. At the public level, there is a confrontation over social and economic rights. On one side are those supporting the inclusion of social and economic rights in the new South African Bill of Rights, as a constitutional acknowledgement of their importance; on the other, those seeking to restrict the Bill of Rights to certain "fundamental freedoms" that impose limits on state action. But there is another front, an almost hidden debate within the anti-apartheid movement. Many people in the movement resist the conversion of an epic and lifelong struggle about power—a struggle against repression, a struggle for the most profound transformation of the character of our world—into a contest for rights.

It is fortunate, I believe, that the nature of the struggle has changed. In many other countries, the people who have come to power have violated the rights, first of their former oppressors, then of persons in their own ranks. The people put their emphasis on the state. By contrast, under a rights regime, the state puts the emphasis on the people, on the poor and oppressed and their claim to the minimal decencies of citizenship in the modern world. We have tried to develop the idea of rights to empower people *psychologically:* to give them a sense of self-determination and self-affirmation; to instill in them a healthy skepticism about states and political parties, even our own. Without the rights rhetoric, I'm afraid, we will end up with a totally uncaring market system that will not solve our problems. A government document on human rights dismissed the idea of a right to health, on the theory that health is bestowed by the Creator, not the state. Individuals have only the "right" to set aside money for medical expenses, which the state must protect. This troubles me.

My faith in rights may appear terribly naïve here in the United States, where so many movements have come and gone, but it is a burgeoning period in my country. We must accept the imagery and language and symbolism that is most appropriate to the occasion. To begin with, the language of rights negates the core principles of apartheid: it says, *You have the right to be who you are.* Beyond that, it encourages pluralism: it says, *You have the right to be different.* Women are empowered, the disabled are empowered; gay and lesbian activists reflect the broader liberation movement. And then it establishes a framework for the allocation of resources that is very empowering for the poor. The most compelling health needs, such as child immunizations and clean drinking water, are a matter of right, and do not depend on some remote notion of efficacy.

At this stage of nation-building, when we are sitting down with our oppressors, the rights rhetoric is very helpful. It helps to allay their fears: we will not lock them up or kick them out or boot them into the country; we want to escape this cycle of domination, subordination, resistance, and revolution, which never ends. As an internationally accepted aspiration, it appeals to the best in all of us. They have the right to their freedoms, we have the right to forgive.

Now I would like to know what Roberto Unger thinks about our commitment to rights in South Africa.

Roberto Unger

My friend here disagrees with me, but I don't disagree with him. There is no disagreement about the bottom line, the goal of political activity. The disagreement is over the top line, the vocabulary we use to justify our common goal. Our dialogue will benefit if we focus on the relationship between the top and bottom lines, between rhetoric and practical achievement.

This said, I think we may salvage a meaning from the discourse of rights that is both practical and faithful to our shared vision of human solidarity. *The right is what you want to take out of the agenda of short-term politics.* The right creates a protective sphere for vital interests, which people need to persuade them that they may accept vulnerability, run risks, undertake adventures in the world, and operate as citizens and as people. The relationship between rights and democratic experimentation is like the relationship between a parent's love and the capacity of a child to mature. Once the discourse of rights is humanized in this way, it no longer endangers the development of human solidarity.

In conditions of great inequality and poverty, the discourse of rights is also useful. My Brazilian friends believe that under those conditions, individual rights are fruitless. It makes more sense to

mobilize resources in public health, food, sanitation, and education. But the claim to a health right serves as one among many triggers to the more general claim of equality.

I can envision an institutional arrangement in which the individual claim to equality in conditions of relative poverty mirrors the claim of an impoverished country in the community of nations. Other nations should put the screws on those countries that are most unequal, those that are mere rackets run by plutocrats. In Brazil, poor children die like flies, but the children of the rich go every year to Disney World in Florida. The prohibition of Disney vacations would cause a convulsion in Brazil. If the country demonstrates a good faith effort in the redistribution of resources, it may press its claims in the community of nations for improved trade and increased mobility of capital and labor.

Albie Sachs

Certainly South Africa falls into that category—it is a country of great inequalities and relative poverty. But the needs of the people extend beyond their material birthright of clean water, medical treatment and food. People want to feel that their pain and their illnesses matter; they want the sense of being an object of concern, of counting, of mattering. Their want is part of the human rights equation.

Roberto Unger

What is the practical implication of this need for the new South Africa? Does investment in public health continue to have priority, subject to qualification, or is there a new priority?

Albie Sachs

Public participation is crucial. Yes, the people say, we want doctors and ambulances; we want a reliable national health service that will take care of these things for us. But a humane political culture calls for the active involvement of the people, and political engagement is what the discourse of rights may provide in my country.

Jonathan Mann

Albie Sachs and others would enlarge our comprehension of human rights. I see in their remarks a grand reach of understanding to the conditions for social amelioration. We in the public health field are trying to do the same: to move beyond the limited notion of health care into the expansive dimension of public health. The World

Bank is moving in this direction. In a recent report, it concluded that the education of women is the most powerful intervention we can make to improve health in the developing world. The education of women is not usually considered a health strategy—and yet it is a concern of the New Public Health (if I may call it that). We are concerned with individual empowerment and personal dignity, as they relate to health, and the social preconditions of healthy living.

Philip Alston

Having listened to Roberto Unger and Albie Sachs, I find myself confronted with an old dilemma. On the one hand, there is the detached, philosophical approach to economic and social rights, the concern for what Roberto has called the "top line." The "bottom line" is almost irrelevant to the pure philosopher. At the other extreme, there is the activist's perspective. He has come in from the field to sit with the philosophers, and he cannot believe what he hears. "This is absurd!" he says. "Don't you academics know what is happening out there? Isn't it clear what we need to do?" Caught in the bureaucracy of the United Nations, I am charged to reconcile the two positions—but I am strongly inclined to reject the contributions of the philosophers. There is a time when one must leave speculation aside and act. Positivism, the impetus of our action, fails to satisfy the philosophical mind, but at least we have left the starting gate.

Michael Mandler

I agree that the philosophical approach leaves something to be desired. Yet, to convince those with whom we disagree, we must address the principles on which we differ. Furthermore, to speak about rights, one need not resort to wiping the slate clean and, on a *tabula rasa*, abstractly formulate the ideal political society. Philosophy does not put that burden on us. In speaking about rights, we can instead refer to the existing fabric of conversations and arguments, even if this fabric is flawed.

Keith Hansen

In fact, history performs two services for us. It gives us a source for certain rights, and it counsels us to look to our own experience, for as Holmes said, experience, not logic, is the life of the law. When the founders of this nation came to draft a constitution, they pondered their colonial experiences, much as Albie Sachs and his colleagues in South Africa are doing today. Give people a monopoly on power, and they will suppress dissent; they will quarter troops

in your home. The Bill of Rights is drawn from human experience, not abstract philosophy. If the founders had included a right to health, it might have been the right to be leeched.

Two centuries later, we know that a free society with a free market must provide certain basic amenities, certain individual and social goods (such as child immunizations), or it will fail. Those who would assemble a contemporary Bill of Rights should know enough to protect the people from their government's acts and omissions.

Henry Steiner

The fundamental civil and political rights that we talk of today occupy only a tiny fragment of human history, yet they often appear to us as though fixed in the heavens, as gospel. Not long ago, in the age of monarchs and the rising bourgeoisie, rights were embattled. Their survival was uncertain. Their development and contemporary entrenchment have been a gradual process. Their scope keeps changing. Before a period as recent as the 1930s, how many thought that social security was a right—in today's idiom, an economic right? Three decades earlier, how many argued for workers' compensation on the grounds of entitlement? Now they are rights, and no one would dare take them away.

Some rights may be natural, in the sense that we can imagine people everywhere and in any historical period to be outraged when they are violated — for example, cruel violations of the right to bodily security. But many types of rights such as economic or welfare rights mature, in law as in consciousness. The political claim becomes a statutory right, that becomes a constitutional right, the constitutional right becomes a human right. One conception of right shades into the other, slowly, until the right transcends its declaration in positive law to become something eternal, ideal, inviolable.

Our current vague articulations of economic and social rights may be part of that historical process. We take the worst instances first, the cases of extreme inequality and poverty of which Roberto Unger spoke. After a while, broader rights to food or housing will vest, and we will have forgotten all the torment that went into their formulation. They will appear natural, eternal, inviolable.

Session II

Defining the Right to Adequate Health

Jonathan Mann (chair)

Let us begin our discussion of public health and human rights with a paradox: health is, in our thoughts, the highest priority, but in politics, an impotent idea. Consider the World Health Organization. The WHO has defined health as a state of complete physical, mental, and social well-being—a broad-based definition. Of course, if the WHO took its own definition seriously, it would be a very different organization.

Almost every culture has a proverb, *So long as you have your health.* All over the world, people rank health as one of the greatest goods. Yet when it comes to decision-making and priority-setting, health vanishes from the scene. There is no effective public health lobby in the United States. (The various health care lobbies are not lobbies for the public health.)

Part of the fault lies with us, the professionals. People experience health problems as individual tragedies, premature and preventable, and fail to see beyond to the political, economic, and social environment that generates and sustains them. How long has it taken the people of this country to see beyond their lung cancer to the culture of smoking, the power of advertising, the permissiveness of Congress? We professionals need to make public health an object of recognizable value.

The Institute of Medicine has formulated the best definition of public health that I have seen: *public health is what we as a society do collectively to ensure the conditions in which people can be healthy.* What are the "conditions in which people can be healthy"? Adequate health care is one, to be sure. We should add to the list clean water and clean air and, if we may go so far, a social environment that respects and supports human dignity. There is much that we know about public health. Our analytic techniques improve by leaps and bounds, and today we more clearly discern the links between social conditions and public health. But in the past twenty or thirty years, as our knowledge base has expanded, our discussion of values has failed to advance.

In my program at the School of Public Health, the Center for Health and Human Rights, we are looking to rights rhetoric to advance the discussion. To speak provisionally: there are three dimensions to the relationship between public health and human rights.

We have observed, first of all, that the practice and policy of

public health implicate the police power of the state. The involvement of the state presses new burdens on the human rights movement; along with the burdens, there is new opportunity. Unfortunately, the state of dialogue between the human rights and public health communities is very poor—a *dialogue des sourds*, each without knowledge of the other.

We have also observed that, generally speaking, the violation of human rights has adverse effects on health. The harm done by torture is obvious, but other harms are less apparent. Contrary to what some think, the pain of arbitrary imprisonment does not end at the prisoner's release. Vietnamese refugees who had been kept under cruel conditions exhibit the sustained, profound, and probably life-long effects of their imprisonment. We in public health feel a moral obligation, an ethical requirement, to document these effects: it is our professional contribution to the rights debate. A woman claims an equal right to education. The polity that would dismiss her claim should know the social damage of their decision.

Finally, we have concluded that the health of populations demands the transformation of society. To me, this came as an awakening. A typical professional in the health sciences, I had never come across the words "human rights"; then I began to work on AIDS issues, and before long, I discovered my loss for words. In East Africa, among monogamous and married women, the risk factor for AIDS is neither the lack of information nor the availability of condoms—the risk factor is the inability of women to influence their husbands' sexual behavior. Given the laws of property and divorce, the woman who denies her husband intercourse risks economic and social death. To improve the condition of these women, one must know how to change society. This is the most profound dimension of our research.

If our work in rights does not bear fruit, we will rename our program and try another line of attack; but I believe we are correct in our observations. I am interested to hear your thoughts on our broad-based conception of public health. June Osborn and Larry Gostin have agreed to make introductory remarks at this session.

June Osborn

I concur with Jonathan Mann that the health professions must expand their minds. Medical care is the narrowest possible construct of "health care," narrower even than health professional care, itself a narrow construct. We must recognize the effect this construct has had on our health care discourse. We no longer talk about health care: we talk about medical care. Managed care, an ostensible improvement, is really no different. When we speak of managed care,

we only mean to push the pieces of medical care around a bit; in treating patients under a managed care regime, we fail to take into account alternative kinds of inputs, which could be more efficient and effective. A good example of this is in the artificial divide that finds health professionals trying to deal with medical problems of the homeless, when their fundamental deprivation makes compliance with medical advice literally impossible.

Rather than expand our notions of health care, it is easier to revert to our old debates and discussions about intervention. Take one such interventionist program, immunization. I can recall the great transition in immunization that occurred in this country in the late seventies. Before 1977, our immunization rate was very poor; but then over a two or three year period, in state after state, immunization was made a prerequisite of school enrollment. This fall, a few of these laws were hyped up in the press. There were stories in Michigan about lines of schoolkids circling around the public health clinics, waiting for the inoculations they needed to attend school.

The immunization model is instructive, but limited. It takes technology as a basis for intervention: the higher the technology, the more successful the intervention. This faith in technology extends far beyond our borders. While on an AIDS consulting mission in the United Arab Emirates, I was taken by a group of proud officials on a tour of their new hospital. *But your hospital,* I remarked, *is several miles out of town; only the affluent could get here easily.* Their reply, that poorer residents could take the bus, was rather inadequate: the bus ran to the hospital only a few times each day, and visitors and the sick would have a tough go of it. Although these officials were part of a committed ministry of health, one of the best in the developing world, they were limited, institutionally (for the ministry was among the least powerful members of government) and imaginatively.

In all the technobabble, we tend to lose sight of education, which is a necessary element of the solution. How much easier it would be if patients were familiar participants, colleagues, in their own health care—and not the recipients of their doctors' paternalism. Some time ago, there was talk at my university of institutional restructuring that would have made the School of Public Health play second fiddle to the Medical School. The University President asked for my opinion of the proposal. *I would be very happy,* I said, *to see the Medical School made a department of the School of Public Health, but not the other way around.*

Let's talk then not about a right to hospital care, which may be of prohibitive expense, but about the right to good health. We demand a high-tech coronary intensive care unit for patients with arterial disease, but neglect the simple means to avoid the disease.

We talk of increasing the lifespan of HIV-infected patients, by means of costly medicines and regimens, but it is always better to avoid infection in the first place.

Education is the gaping hole in American health today. It compounds the problems of poverty. I find it remarkable that so many impoverished populations in this country struggle with the disease of obesity. Calories aren't the issue; lack of understanding about calories is the issue. What are the components of a right to good health? Education, I submit, is one of the most profound.

Larry Gostin

The case for health care reform in the United States is rock solid. In this wealthy country, where twelve percent of the gross national product is consumed by health care, forty million people are uninsured, millions more are underinsured, and morbidity and mortality rates vary significantly across sexual, racial, and socioeconomic lines. Countries that spend a much smaller percentage of their wealth on health care enjoy superior morbidity and mortality rates and manage to guarantee access for all. It is only when you turn to the practical issues of reform, when you sit down to design a better system, that the ground beneath becomes a little shaky.

To give you a flavor of the tradeoffs and complexities, which are rather overwhelming, I will discuss four facets of the ideal health care system: access, equity, justice, and choice.

Access. Under the proposed plan now developed by the Clinton Administration as the basis of a national health care system, what are our rights to be? The members of the Administration's task force (including me) tossed a few ideas around—a right to health, a right to any requested treatment, a right to the treatment offered by the physician, a right to pre-defined medical procedures. No sooner had we settled the matter (we chose the last option) than we found ourselves in disagreement over the related issue of justiciability. A few among us advocated the unrestricted justiciability of the newly-created right. Others feared that the courts, unwilling to gamble with the lives of patients, would order even the most expensive and improbable procedures, an unfortunate diversion of scarce medical resources. (This latter argument mirrors Roberto Unger's general criticism, that the rights framework impedes the desired social outcome.) The final package presented by the Administration made use of alternative dispute resolution.

Equity. The task force had many discussions about equity; the definitional issue, as Martha Nussbaum described it earlier, was prominent in our debates. The permanently disabled and the chronically ill objected to the equal distribution of benefits. We decided

that there were no tenable moral distinctions between acute treatment and long-term care, nor, for that matter, between physical health and mental health. But we were overruled. Politics, you know, holds the real "trump."

The prospect of a "two-tier" health system stirred up debate. One group claimed that since certain standard benefits were guaranteed for all, there was no equity problem. Others of us strongly protested: congregate poor people in poor plans, and equity problems were bound to follow. The final plan includes some, but not all, of our recommendations for a more equitable system.

Finally, we also had to discuss equity on the other side of the equation, the equity of funding. We hashed over progressive and retrogressive systems, payment and taxation schemes. Funding, we found, is a complicated issue.

Justice. There were two kinds of "justice" issues that had to be resolved: substantive justice, the just distribution of health benefits and burdens (which we discussed with regard to equity); and procedural justice, the remedies available to the system's "losers."

Choice. The libertarians who clamor for choice want their choice of doctor; but a health care system might grant other choices, such as the choice of treatment and the choice of subscribing to a public plan or opting out. Unfortunately, choice in one area often means lack of choice in another. Tradeoffs are inevitable. But the idea of autonomy, the ability of patients to make free and informed medical decisions, prevailed within the task force.

The Administration's health care plan gives unequivocal support to only one of the social and economic rights we have discussed, the right of access; yet even in this, one foresees many obstacles to the realization of the right. The lengthy phase-in period gives antagonists the opportunity to gain political power and derail the plan. The plan removes only one of the barriers to universal access, cost; but many patients lack access for reasons other than their inability to pay. The proposed new right to access is vulnerable.

Henry Steiner

What influence did the notion of entitlement or right have on your deliberations? It appears to have served as a general directive, both moral and legal, rather than as a legal obligation of government. Surely that notion was not precise in its implications for one or another health program. It might have distant from anyone's thoughts as discussions worked out of cost-benefit analyses and participants worried about political consequences and interest groups. It would have emerged, if at all, as a side constraint, a restriction on certain alternatives that offended notions of individual dignity or choice

or equal protection rather than as a lucid guide to the development of a program. Is that the case, or did anyone in your group insist on rights as a way of holding to a particular ingredient of the plan?

Larry Gostin

Rights did enter the discussion. It came about, when the task force was about to deviate from one of the norms, that someone would interject, *Wait! Can we do this?* First the group would turn to its lawyers for a legal ruling, for assurance, really, that we could get by the U.S. Constitution. But now and again, in a more generous, spirited way, a member would speak to the morality of the proposal under discussion.

Martha Minow

As I listened to Larry Gostin speak about the Administration's task force, I could not help but think about the well-observed distinction between health care and public health, and notice yet another barrier to our expansive vision of health, the health care bureaucracy. Every winter in Boston, lawyers like me receive calls from pediatricians, whose patients' families have fallen behind on their utility bill and are about to lose their heat. I do what I can: a threatening call, an advised appeal from the doctor (depending on his local reputation). Where in the predefined benefits plan is that kind of care, that kind of call, the person who can cut through the inevitable bureaucracy?

Our professional and institutional practices are fragmented and separated. Let me give you an example. A number of us here have argued that the right to health compels advancement in the education of women. Well, I have gone to educators and argued the converse, that kids whose health is neglected cannot function in school. The educators' eyes glaze over. They will not take up the cause. The educational, health care, and social service communities are at war, in part a pitiable struggle for resources, in part a pathetic professional conflict. We should begin to think about the integration of services, either to put all our weight on the side of health or education, or to build coalitions from among the antagonists.

June Osborn

Indeed, we have urgent need for the integration of services. As anyone involved in AIDS work will tell you, the single worst problem in dealing with the epidemic is housing. In our prisons, the cellblocks crowded three times past capacity are crucibles for infectious diseases, tuberculosis included.

Adetokunbo Lucas

Whatever we mean by public health, education is essential to achieve it. It is a principle of occupational health, at least in England, that every worker understand the risks of his assignment; otherwise, he is unable to protect himself. So too, the general public has a right to medical information. The government that suppresses this information has committed a hostile act. In England, a government minister who warned of salmonella in eggs lost her job: her remarks threatened the sale of British eggs. We hear now of secret experiments conducted by governments on their own citizens. Indeed, so much has happened to make us wary, that the people of one West African country, fearing contamination or disease, spurned a government offer of free meat.

The suppression of information has serious consequences for the population, whose health is endangered, and for monitors of government, who are unable to evaluate government policies. Neighboring countries, too, should have a say in the matter. There is the medieval legend of the small village that, having been infected with the Plague, cut itself off from the world out of duty to its neighbors. No one broke the quarantine and nearly everyone perished: an extreme case, yes, but a powerful lesson in consideration. International agencies, such as WHO and UNICEF, should establish standards for the right to information, and the United Nations impose sanctions where the standards are breached.

Martha Nussbaum

While we are on the subject of education in health care, I would like to raise again the issue of patient preferences. A study conducted in India compared two groups of patients, one of widows and one of widowers. The widowers were, by and large, in much better health than the widows, but complained more about their health. A follow-up survey was taken some years later. In the intervening years, the widows were informed of the health status of woman around the world; they received information about nutrition and so forth. As it turned out, the widows' own health hadn't improved very much, but their complaints and their demands had increased. They were now able to see their situation, not as "natural" for a woman, the best a woman can achieve, but as a bad state of affairs that can be changed.

The UN Development Program, I believe, has recognized the crucial importance of education in women's health. I would add this: education matters, but not only in the obvious ways. To be sure, women who know about sanitation can take better care of their children; but these women will also have a better understanding of their

own health conditions, their own options, which may lead to better access to employment, and, in turn, to greater command over resources in the family. By casting rights in the terms of functional capability, rather than of preferences or of resources, one sees these important connections between health and employment, education and health.

Albie Sachs

To all that has been said about rights and public health, I would like to add two more rights: the right of governments to be stupid and the right of people to be wise. I am cautious about constitutional principles that preempt any government forward planning, for they inhibit democratic governmental experimentation and public innovation. There are those in my country who would constitutionalize the right to free enterprise. Their success would be the death of any community medicine or real public health system. The fight would be lost before it had begun. Governments have the right to err.

People have the right to be wise, and indeed, if we look beyond the enlightened professionals who earnestly persuade the people of what is best, we see that in the community there is a great deal of wisdom. In South Africa, with its extensive tradition of popular resistance to the state, communities are largely autonomous and self-organized. Thousands strong, situated even in the poorest areas of our country, community organizations are the perfect vehicles for education, housing, and health programs. We are looking now for a way to represent them in the constitutional framework—a fourth political entity, neither the state nor the citizen nor the party, which we may call *civil society*.

Philip Alston

Albie Sachs notwithstanding, we are approaching the point at which the U.N. Committee on Economic, Social, and Cultural Rights has often found itself immobilized. One right, the right to health care, has proliferated into many rights: rights to education, medical information, housing, political participation, and so on. If this were an official meeting, we might have noticed the policy-makers anxiously leave the room. How do we reconcile the mobilizing power of rights rhetoric, to which we will all attest, with the dwindling support for an expansive view of rights?

Keith Hansen

To respond, there is a common fallacy that economic and social rights are imprecise, hence the anxiety of the policy-makers. But these rights are not imprecise. On the contrary, their definition is a matter of simple biology, which observes fundamental scientific rules. Ask my opinion of an intervention, and I will tell you that the intervention will produce such-and-such an outcome (and give you ten thousand data points to prove it). We have only to agree on a broader definition of the right to health; the rest is easy. A few cost-effective interventions and the citizens of the Indian states of Kerala—which have a annual income of $300 *per capita*—enjoy a greater life expectancy than the citizens of South Africa and the residents of Harlem, in America. How much do you want to spend? That's a political issue. But you can start off with the basics.

Jonathan Mann

I am in full agreement with Keith Hansen, and would add only this: that we must bring good science to the political debate over interventions, humanitarian and otherwise. About 250,000 Iraqi children perished in the Persian Gulf War, not in the impact of our weapons of mass destruction, but as a consequence of our surgical strikes on Iraq's infrastructure, its water treatment facilities and power plants that were essential to human survival. If we had known that war would cost the lives of a quarter-million children, would we have gone so hastily to war? Would that information have affected the political debate? One cannot know how things might have been; but to some of us, the absence of such important predictive information, which was within our grasp, represents a moral blot on the nation and a failure of the scientific community.

Michael Mandler

Just a caveat on the notion of "good science." Seemingly impartial arguments may well conclude that a certain goal is better served by a reallocation of resources; but in the health care context, such efficiency arguments are a political dead end. Efficiency counsels us to pluck our scarce resources from the surgeons, who would perform expensive heart bypass operations, and pump them into mass immunization programs; that is the way to maximize lifespan in our society. This solution is unrealistic. It flies in the face of those with wealth and power, such as heart bypass patients, who will resist this argument. A politically viable solution would not take money from the surgeons; it would set basic health services for the poor beside the existing plate of services for the elite.

Henry Steiner

Keith Hansen has proposed one solution to Philip Alston's problem of paralysis when the conception of economic and social rights expands to outstrip the political reality. But even his solution presupposes the political will to provide a social benefit. Is rights rhetoric powerless to muster the political will? In Keith's solution, rights rhetoric does not appear; in our discussion of policy, rights rhetoric has figured mainly as a broad directive principle or an ideal to be achieved over the long run.

What does our broad, systemic discussion of health policy suggest about human rights? Perhaps the claim and recognition of many rights, civil and political as well as social and economic, grow out of contingent historical processes. Torture may everywhere be considered a violation of some conception of human dignity and right. But the claimed right to housing in many societies may grow out of particular political and moral developments and traditions.

Note that the rights enshrined in our universal instruments give us an astonishing range of choices about how to act and about what institutional frameworks to build. Included in the right to due process is the implied right to a fair trial; but to give texture to that right, we must invoke many considerations of utility. We must weigh the pros and cons of the jury trial and how to provide counsel to indigent defendants; no one solution is demanded of us, and throughout the world we see different solutions that seem consistent with the broad norm. Specific entitlements are a matter of habit, of historical convention, and may be slow in coming. It is no wonder that some participants here feel paralyzed.

Much of our discussion here bypasses the sticking points for many rights theorists, such as the concept of a precise assignable correlative duty, or the idea that every right must have a remedy, and generally a judicial one. As we apply rights discourse to the economic and social world, quietly or explicitly, we redefine the right's character and meaning.

Roberto Unger

I, too, would like to say something about Philip Alston's paralysis problem. Our broad discussion of health policy contained a specific conjecture: the single most important contribution to both public health and empowerment is education, a special kind of education that makes use of community organizations. Rising out of community activism, these organizations can become co-responsible for necessary services for schoolchildren, such as food support, sanitation, and adequate medical care; in performing these functions, they take on an institutional role, outside the government or even against the government. This institutional arrangement, it seems to me, is not a recipe for paralysis, but a very particular formula for progressive transformation.

Martha Minow

The paralysis that Philip has experienced suggests the value of flexibility and such novel approaches as Roberto Unger has demonstrated. It suggests that we resist categorical thinking, especially in the articulation of rights and entitlements. Categorical thinking imposes paralysis. Consider this example from Massachusetts law. A person cannot bring her children into most residential drug treatment programs; in the typical case, a single mother who would enroll loses her children to the state. On her release, she finds herself in a catch-22. She cannot become eligible for subsidized housing for families with children because her children have been taken from her; the state will not return her children before she finds adequate housing for them. The situation of this single mother typifies the problems of categorical funding and categorical thinking.

Earlier, we worried that our discussion had become too broad: all of a sudden, we were talking about education, although the topic of discussion was public health. We thought that we had fallen into a trap. But we were thinking broadly, against narrowing categories, and in broad thinking lies the promise of a better system.

Harvey Fineberg

I would like to bring us back once again to the relationship between rights rhetoric, the topic of our first session, and public health.

We agree that the promotion and protection of human rights has a positive bearing on the health of a population. (We all accept this hypothesis, in its weaker or stronger versions.) Any justification for rights that we make on the basis of this hypothesis is consequentialist: we support human rights for their beneficial impact on our real concern, public health. In the first session, however, we found the justification for rights in certain honorable principles, not in consequences. To what extent does the consequentialist argument inform the definition and adoption of a right? And let me ask another basic question: how might we test the hypothesis, that human rights and public health are interconnected? Where might we find persuasive evidence?

Paul Farmer

How might we demonstrate that human rights and public health are interconnected? A few years ago, the United Nations Development Program devised a human development index, which integrated life expectancy, average educational achievement, and gross domestic product into a single measure of human well-being. It became known as the "bliss index."

I think the UNDP analysis is limited. In gearing its figures to a national scale, it masks both inequities within a society and, of particular concern to me, inequities among nations—even those bound together in the same social and economic webs. The continuing health of particular people in one country might well depend on the suffering of others abroad: the well-being of residents of Wellesley, Massachusetts might be tied to the suffering of Guatemalan peasants. One senses a need for more fine-grained research to address these international questions—for example, in the study of infectious diseases.

Surely AIDS is a marker of our interconnectedness and, at the same time, of the vast disparity in resources available to those who are wealthy and those who are not. For example, it's clear that HIV came to Haiti from North America, via a sexual tourism premised on inequality—but the resources necessary to prevent an explosive Haitian epidemic did not follow the virus. Taking a more systemic view, this might look like poor people being put at risk for a disease and then being denied access to treatment or to effective prevention. Isn't there a sort of human rights issue here, one obscured by strictly national analyses?

Philip Alston

I would like to speak to Harvey Fineberg's first question. To what extent does the consequentialist argument inform the adoption of a right? In international circles, we are under some pressure to perform a cost-benefit analysis on prospective rights, to determine their cost-effectiveness. The World Bank's development report on health falls into this line of argument; its "basic needs strategy" of the 1970s was justified in the same way. But the history of human rights tells a different story. Since the Enlightenment, cost-benefit analysis (or the pre-modern equivalent) has not been the basis of civil and political rights. Rights were recognized when we removed practical considerations from the most pressing questions and took a dogmatic approach. For example, women and peasants were denied the suffrage for their supposed stupidity and ignorance of the affairs of state. The breakthrough came when someone acclaimed universal suffrage as a fundamental value.

Harvey Fineberg

Yet one cannot get away from consequentialist thinking. In the first place, our principled conviction in certain rights is strengthened by our recognition of their positive consequences. For example, supporters of a universal right to education know that education brings opportunity. Second, consequentialist arguments weigh very heavily

in political decision-making, as they did on the Clinton Administration's health care task force, which Larry Gostin described. We cannot ignore them if we hope to make a case for non-traditional rights.

Philip Alston

As Henry Steiner suggested, there are two phases of rights. The lower-level applied rights, such as the elements of the right to a fair trial, may be developed in a consequentialist exercise; but the starting point of rights, such as the right to a fair trial, lies beyond consequentialism. Today economic and social rights are an open field; we find ourselves at the starting point. Our challenge is to extend the dogmatic approach as far as we can. The right to an education becomes, say, the right to a primary education; the particulars are left to the policymakers.

Martha Nussbaum

I'm not at all convinced of the distinction between the consequentialist argument and Philip's "dogmatic approach." So much depends on the account that one gives of the consequences of rights. A narrow account, one that considers only the net gain or loss in Gross National Product, is problematic; but a broader and more inclusive consequentialism can take in much of what Philip intends by the "dogmatic approach."

Keith Hansen

Nor am *I* convinced of the sanctity of Philip Alston's "starting point." Rights are formulated from experience. We come to recognize that regardless of cost, some things make good sense; these are the things we choose to protect. The analysis we use to arrive at our conclusion is consequentialist in some broad sense, broader than economic or cost-benefit analysis, reflective of our experience.

Michael Mandler

I would resist the consequentialist approach to evaluating rights. Consequentialism tends to collapse into cost-benefit analysis, which is absurd in the context of fundamental rights. In a cost-benefit analysis, the marginal utility of the educational dollar is staked against the marginal value of the health care dollar—the money goes to the one or the other—even though education and health care are effectively incommensurable goods. We simply do not know how to weigh the particular human benefits of health care and education against one another. The attempts of utilitarian philosophers to

resolve such dilemmas of evaluation through a universal measure of utility have proved remarkably unproductive; economists, with little more success, have attempted to use dollar values to the same end.

June Osborn

I'll tell you a story about the dangers of consequentialism and the necessity of a principled right to health. Some time ago, I was invited to appear on a talk show. The U.S. National Commission on AIDS had just released a report on prison health facilities, and I was asked to speak about our findings.

Well, I said, *there is a great discrepancy in the treatment of HIV-infected inmates. Prisoners with AIDS die in 182 days, while outsiders with the same battery of infections die, on average, in 312 days.*

What's the difference? someone on the show replied. *They're going to die anyway.*

I was speechless. Simply speechless. The correspondent would have made health care conditional on the individual's on-going contributions to society. And that is why I say the right to health must be unconditional.

Martha Minow

Here's my take on the consequentialism controversy: if you care about consequences, it is dangerous to ignore human rights. Consider this local example. There has been great concern over the high infant mortality rates of many communities. The state mustered the political will to do something about it. But in formulating policy, the state thought in narrow categorical terms. The result? An increase in expensive tertiary hospital care of low-birthweight babies—a lot of fancy technology—but no improvement in outreach programs for prenatal care. Under a human rights framework of analysis, one would have allocated the dollars differently.

The human rights perspective is incisive: it discerns the human action behind the divine will. The baby is premature, underweight, and sick—well, that is not the inaccessible work of God, but the preventable result of inadequate prenatal care. Once the human cause is ascertained, the burden falls on society to do something about it. As someone once said, civilization advances when what was perceived as misfortune is perceived as injustice. The progress of civilization owes itself less to natural law and more to good social science.

Troyen Brennan

Having linked morbidity and mortality rates to the inequitable allocation of social resources, the public health movement deploys

human rights to advance the agenda of social redistribution: this is a consequentialist point of view, and rights rhetoric is mere packaging. But does rights rhetoric set you on the right course? It might chip at the problem through litigation, resolve some of the inequities (like those that affect the disabled)—but will it solve the massive problems that we see? I think we would do better to admit we're consequentialists and strive openly for redistribution, our true goal.

Martha Nussbaum

But rights rhetoric has value for those who advocate massive redistribution and social equity. It helps us resist the sort of cost-benefit analysis that our colleague Michael Mandler fears, in which education and health care are staked against one another for the next dollar. Rights rhetoric prevents the reduction of education and health care to a common standard of measurement. To the rights advocate, they are things of intrinsic value.

Michael Mandler

Martha Nussbaum is quite right. Furthermore, the global argument for equality that Troyen Brennan advocates is bound to fail: go out into the world and make that argument that, on redistributive grounds, health care resources should be devoted to the poor, and you will find yourself on a slippery slope. *Why talk to us about equality in health care,* they'll ask you, *when all you really want to do is redistribute wealth? Why don't we simply give more money to the poor? Let the poor, if they wish, spend their new wealth on health care.*

For this reason, I would not be too hasty to downplay rights rhetoric. The rights argument at least appeals to particular and concrete grounds for a reorientation of social goals. Win or lose, it can potentially convey the characteristic and distinctive value of health care and thereby provide the beginnings of a *rationale* for a redistribution of wealth. Unadorned appeals for redistribution, on the other hand, provide no such rationale and thus are all the more likely to run up against both political resistance and a suspicion that a sweeping agenda underlies the call for redistribution.

Troyen Brennan

Michael, I don't see how rights language gets us any farther than the global argument. Like you, I have heard complaints within the public health community of overzealous egalitarians. But do rights advocates fare any better? Are rights advocates able to make the critical distinctions among social goods that move policy forward?

Karl Klare

While I concur with Martha Nussbaum and Michael Mandler that rights rhetoric has demonstrable value for advocates of health equity, I believe for two reasons that Troy Brennan is onto something.

First, I share Troy's doubts about the capacity of rights analysis to make critical distinctions among social goods. A few minutes ago, Martha Minow made a very strong claim to the contrary: in her opinion, a human rights perspective on infant mortality would have suggested an outreach program of prenatal care, rather than high-tech hospital treatment. Her conclusion is not obvious to me. I do not see how rights rhetoric would distinguish between the two solutions or recommend one over the other. I think it affords us little purchase in this area.

Second, I question the long-run value of rights rhetoric. There is a strong desire among advocates of civil and human rights to avoid redistributive arguments. We are afraid of them, or rather, we are afraid of the political explosions they will trigger: we seek in the language of rights a neutral avoidance mechanism. This is an ancient tactic among American lawyers, too, by the way. In America, we often use efficiency arguments to talk about redistribution.

The Human Rights Committee, the international body that interprets the Covenant on Civil and Political Rights, has observed that the Covenant does not privilege any one economic, political, or social system. Of course, I recognize the legal significance as well as political necessity of the Committee's observation. Even so, I wonder how people committed to fundamental human rights could seriously present themselves as neutral on matters of political and social order? Perhaps they feel bound to operate in this way; but in the long run, it may benefit our cause little to avoid the politically charged questions.

Martha Minow

I want to clarify for Karl Klare my earlier remarks about the "human rights perspective." I do not suggest that a human rights analysis of the local infant mortality problem would have led directly to improvements in health services—but it would have changed the debate. It would have put on the agenda some items that were excluded; it would have allowed for wider participation. When rights are on the table, people talk differently: then the world will be different. That's my view.

Philip Alston

And I want to take issue with Karl Klare's characterization of the international human rights community. In the international debate over economic and social rights, no one is concealing the issue of redistribution—that is why Western states are so resistant to them. In the United States, politicians proffer a right to health care that requires no social redistribution, but that's just an American distortion.

June Osborn

It amazes me that this group would begin to question the value of an absolute right to health. Its value is clear to me. Our skepticism over the right to health only indicates our need of better evidence, evidence to overcome our false intuitions. Goodness knows, if half the outcomes of social and behavioral science weren't counterintuitive, we wouldn't need social and behavioral science!

Jonathan Mann

I think Martha Minow has identified the distinctive value of rights in her infant mortality example. The rights framework has value as a conceptual tool: it facilitates discussion, it enables people to articulate their own needs. One family might lack heat, another education; a third family might have a more immediate health problem. A young man without a future will not accept your two cents about condoms—he has his own needs.

Let us provide people with a framework to think about public health. If they don't want to speak about health as a right, we will save ourselves hours of theoretical discussion. If they do adopt a rights framework for their discussions, so much the better.

Paul Farmer

Global welfare arguments might not fail if they were less timid about using the concept of justice. But should we table a more global analysis of social inequity because it would produce a poorer discussion? It seems to me that the examples Jonathan Mann gives—the family without heat, the young man without a future—fit more easily into a broader framework of social redistribution. For clearly, some have too much heat and a surfeit of future possibilities.

Jonathan Mann

Actually, I don't see the need to choose between the two discourses, redistribution or rights. Redistribution may not take in every issue.

Given the current state of our analysis of socioeconomics and health, who can say that redistribution will suffice to accomplish all that we intend?

Michael Mandler

Jonathan Mann is quite correct. Those who say, "Health care is a right," and those who say, "Redistribution is the answer," have gotten ahead of themselves. These statements (which have occupied our attention for some time) are not premises for further discussion, but preemptory conclusions.

Philip Alston

The definition of any right requires time and broad discussion. The philosopher working alone in his study will never arrive at a definition that is beyond challenge. Indeed, the accepted norm may be quite arbitrary, a product of historical or cultural circumstance, the demand of a people or a society at a discrete moment in time. We are only just embarking on the definition of the health right. For many years, the World Health Organization suppressed international discussion of the issue: mention the universal right to health, and they'd throw you out of the building. It is only now that Jonathan Mann and others are beginning the debate.

Martha Nussbaum

In beginning to define the right to health, we will confront a number of difficulties. People are more comfortable talking about health care than about health, for health is something that lies outside our control. The right to good health appears as meaningful as a right to be happy in love! In preparing a framework for broad discussion, we may have to limit the goal to what we think we can deliver. Cultural relativity is a second problem. Is health a human universal? Even in the matter of nutrition, where one would expect unanimity, there is disagreement about whether being well nourished is a human universal.

These difficulties are by no means insuperable, but as we set out into the world for discussion and debate, we should bear them in mind.

Session III

Institutionalizing Economic and Social Rights

Philip Alston (chair)

The principal stumbling block to the realization of the Covenant on Economic, Social, and Cultural Rights has always been the debate over the nature of state obligations. In the case of civil and political rights, it is assumed that these obligations are absolute and immediate. The country that is impoverished and in major difficulty, like the Uganda of ten years ago or the Zaire of today, still must respect the right of its prisoners to decent conditions. Of course, it is ludicrous to hold such a country to this obligation. International human rights bodies will insist on it for formality's sake, but no one takes them seriously. In reality, a sliding scale is applied.

By the terms of the Covenant, social and economic rights are neither absolute nor immediate; nonetheless, states are not without obligation to fulfill them. The obligation consists in two words that are often overlooked: state parties must "take steps" to realize the rights enumerated in the Covenant. The duty is qualified by the state's available resources, and so on. Even so, the obligation to "take steps" remains.

Until recently, there has been no international forum to discuss and debate the nature of the obligation and the content of particular rights. The U.N. Commission on Human Rights devotes about five percent of its time to economic and social rights issues; other human rights bodies usually ignore them. The only body mandated to do work in this area, the U.N. Committee of Economic, Social, and Cultural Rights, was established in 1987 on the implicit condition that it be ineffectual and inactive. Not until the Soviet Union had dissolved and the Cold War had ended was the Committee free to go about its work.

As the Committee's Special Rapporteur, I am keenly aware of its problems. In the first place, we receive little institutional support from anyone. The U.N. Secretariat provides only rudimentary clerical help; I myself typed about half of our recent report for lack of a secretary with word processing experience. The International Labor Organization and the World Health Organization observe Committee sessions from time to time, but neither group has made a single serious contribution to its work.

The Committee also lacks expertise. The membership consists of attorneys general and ministers of justice, former diplomats who are nominated and elected and arrive at their positions through the

spoils system—the prestige of a seat on the Committee, six weeks a year in Geneva (expenses paid). Of the eighteen elected members, only some are capable of a real contribution. Ninety-five percent of the written product is churned out by myself and by a German international lawyer during our part-time work on the Committee.

The Committee uses three techniques to promote economic and social rights, all of them failures. The first, the Committee's review of state periodic reports, goes nowhere. The Committee has no external sources of information and must rely for its analysis on the probity of the reporting states; the states are under no pressure to give an accurate report. *Ladies and gentlemen of the Committee,* they'll say, *we are delighted to announce the placement of 45,000 new hospital beds.* But what was the country's actual need, 40,000 or 4 million? We never know. I find it a wonderful contrast that in a private meeting with the World Bank, state officials will wring their hands ("Oh, the country is falling apart, people are dying like flies, you've got to give us money!"), while before the Committee, they wear big smiles and say that everything's hunky-dory.

The Committee's principal sources of information are *The Economist* and the Lexis/Nexis computer network. We are in desperate need of researchers. Most members have little independent knowledge to deploy. *Ah, Australia,* they greet the state representative presenting the periodic report. *Can you tell us, in your country, are there any social or economic problems?*

If the monitoring process is to work, on a national or an international level, it is necessary that the monitors narrow their review of periodic reports to a discrete number of concerns. Let us select these issues arbitrarily, if necessary, but let us at least agree: there are six fundamental components of the right to health, and states must provide information on each.

The Committee's second technique, devoting one day of its annual session to an open discussion with outsiders, is another failure. The U.N. provides no resources to cover the expenses of participants. U.N. agencies stay away in droves. Sometimes they send an "interagency liaison officer" to speak a few glib words about the agency's concern for rights. There is no exchange of information among agencies, no exchange of ideas.

The Committee's third technique, which perhaps has been of some use, is the issue of general comments on the nature of state obligations. These irregular documents are our papal bulls, our encyclicals, or so we intend them: fairly definitive statements on the interpretation and enforcement of the Covenant. In theory, they pass throughout the U.N. system with the highest imprimatur of the Committee. In fact, we've adopted only four such comments, and I have written virtually every word over lonely weekends in Geneva, desperate for others to participate.

Yet for all the institutional problems that plague us advocates of social and economic rights, the chief stumbling block has been our own dismissal of the genuine differences between the two categories of rights. One can purport to set international standards for civil and political rights, to recognize the obscenity of torture no matter where it is practiced; but the standard of achievement of economic and social rights will vary significantly among states. In the development of a right to adequate health care, the United States and Haiti require different benchmarks.

We have asked states to describe their aspirations and set schedules for the realization of rights, but we have less power than a flea on a dog's back. U.N. agencies with greater authority will neither call states to task for their terrible performance on human rights nor stand behind the Committee: they want to keep their distance. None of the truly effective international non-governmental organizations do much on economic and social rights. The Lawyer's Committee on Human Rights and the International Commission of Jurists do a bit. Human Rights Watch has had an ideological or philosophical objection to economic and social rights, and does not participate in any way. Hundreds of NGOs send representatives to the U.N. Commission on Human Rights to protest violations of civil and political rights. At our sessions, you'll find just one representative, a fellow from the Habitat International Coalition, sitting rather quietly. Lawyerly NGOs, accustomed to traditional legal argument, cannot accommodate economic and social rights within their comfortable framework.

The Committee has made suggestions to improve the situation. Our priority is an effective monitoring system, without which intervention of any kind is impossible. Even the United States, with its advanced information technology, does not fully monitor the health of its population. Obviously, developing countries are in a worse position.

We also have suggested that countries engage in some sort of public debate on their objectives under the Covenant. All that we would require is a good faith effort; we can at least identify instances of bad faith and total neglect. For enforcement, one can use the carrot or the stick. States are unwilling to use the stick for violations of economic and social rights: when the rich nations violate them, how can one condemn Haiti and Zaire? The use of a carrot, international aid made conditional on achievement in economic and social rights, is anathema to the U.N. system and antithetical to the U.N. Development Program.

Let me conclude my discussion of the Committee with its most interesting suggestion. The Committee has observed that neither state courts nor state legislatures alone can bring social and eco-

nomic rights into fruition; some intermediate institution is necessary. In this, we have borrowed a page from Roberto Unger, who will have some words to say on this score.

Roberto Unger

Yes, I do have something to say about the institutionalization of rights, but first I must say something about the standard to be institutionalized.

In many countries, the discussion of the health right takes place as a series of intersecting debates. One: Should we invest public monies in therapeutic hospital care or in preventive public health programs? The disproportionate investment in hospital care is already an embarrassment in the wealthier nations and a scandal in the poorer ones. Two: Should we support a narrow, traditional public health program or such a broader conception of public health as Jonathan Mann recommends? In the latter case, a health program might emphasize the education of children. Three: Which institutional scheme is most conducive to health reform: the traditional redistributional scheme, tax-and-transfer, or structural reorganization?

It is important that one understand the position he takes in each of these debates. The minimalist, the advocate of the first position in the three debates, expects a traditional discussion of discriminate, justiciable rights. The maximalist, the advocate of the second position, expects more. He will allow traditional rights an accessory role, perhaps in the definition of minimal standards, but insists on folding them within a larger framework of conflict and controversy. He might imagine the international sliding scale, which I noted in some earlier remarks: the impoverished nation that is innocent of inequality and exclusion has a claim against the world; the impoverished nation that is marked by inequality and exclusion must suffer the claims of the world. Somehow the maximalists of the world must gain ascendancy over the minimalists.

I agree with the Committee's view (as described by Philip Alston) that alternative institutions are necessary to realize our aspirations. There is an intimate link between the definition of rights and the institutional setting of their formulation and enforcement. Consider the example of so-called "structural injunctions," employed in the United States and elsewhere, that may rest on constitutional principles found to be violated by the enjoined institution. In the United States, we are most familiar with the structural injunctions that were used to integrate the public schools. This practice of structural intervention and reconstruction is truncated in several respects: courts refuse to follow the reconstructive activity

to its logical ends, the eradication of the deeper social evils that cause the apparent ones; courts intervene only in socially marginal institutions, such as prisons and mental health institutions, rather than in the central institutions of production and political administration; courts are themselves inadequate to the task of episodic, structural intervention, which require a legitimate alternative to the existing branches of government.

The more one takes the maximalist position in the health debate, the less satisfied he is likely to be with existing institutional arrangements.

Jonathan Mann

Roberto Unger seems to have hit the nail on the head: it makes little sense to establish an ambitious, alternative institution when no adequate standard exists. A certain amount of participation and research is required before the institution is devised. How do we proceed then? What sort of institutional setting would most reward our efforts at defining economic and social rights?

Roberto Unger

In the first place, one must take a stand in the three debates. A minimalist would not speak of institutions as you have. Let us suppose that we are all maximalists, like Jonathan Mann. Perhaps we would think about international institutions by analogy to our domestic experiences. In the 1950s, the United States began to promote structural change with an incongruous institution, the federal judiciary. The capacity of the judiciary was stretched to the breaking point, to the point of truncation; then conditions demanded something new. Unfortunately, I don't know enough about the structure of international organizations to identify the most promising starting points on that level. I'd like Philip Alston, our U.N. expert, to speak to that.

Philip Alston

To think about the appropriate institutional setting for economic rights in the international context, we should draw upon our prior experiences with more developed rights. Civil and political rights evolved out of the Universal Declaration, an unlikely provenance: the United Nations conceived the Universal Declaration in a vacuum and had no intention to implement its provisions. One did not see a ground swell at the grass roots, a mobilization of the masses. Rather, progress came when, in a number of instances, governments concerned themselves with the behavior of other governments and

when NGOs entered the fray. It should be said that, in the main, NGOs did not debate the development of norms, as might a legislative body. They appealed to the conscience with soft, vague definitions that had no particular justification in institutional practice.

Amnesty International and other groups espoused the minimalist position, which many of us find a bit absurd. It looks silly to appeal to the good President Mobutu for fair hearings when his entire system is brutal and corrupt. But these limited calls for reform gradually wear down governments: the charges build, the administration appears incorrigible, and the complaints about due process come to carry an implicit message of political transformation and fundamental reform.

The first step in the development of the health right, I think, is the mass recognition of a right to health. Make it a political issue, as U.S. Senator Harris Wofford did in his election campaign; get people angry. Then an independent body, led by Jonathan Mann or someone like him, will draft a bill of health rights, a few select demands around which advocates can mobilize. You change the terms of the political debate. On the international level, UNICEF has been pursuing this strategy for several years.

Karl Klare

Let's consider the United States for a moment. It's fair to say that, in the early years of the Clinton presidency, the health care issue has become politicized. Given limited time and resources, does it make sense for public health advocates to invest heavily in lobbying for ratification of the International Covenant on Economic, Social, and Cultural Rights? Are there other avenues open to advocates who wish to "change the terms" of the national political debate that might be more effective?

Philip Alston

In the United States, health reform may be a political issue, but it is not a popular issue. Social activists have not mobilized, not even to make a minimalist appeal. The debate is bureaucratized, and all that trickles down from Washington to the people is the *New York Times* coverage, so densely technical that even I stay away. Because the public lacks a simplified definition of the right to adequate health, the national debate will run off the tracks.

Karl Klare

Let's be fair. The American public is agreed that the present health care system is inadequate. There is tremendous anger out there, there is widespread grievance; and even if a definition has not yet crystallized in the public consciousness, there is promise.

Philip Alston

The bureaucracy will channel the public's anger through the legislature and the judiciary, and the debate will wander off the grounds of the initial grievance. The public has been bypassed.

Henry Steiner

I suggest that the national debate does have something to gain from the international movement, however weak that movement has been in guiding us toward structural change. Both the governmental and non-governmental organizations in the international movement are intensely specialized: a racial discrimination committee, a gender discrimination committee, an economic-social rights committee, a NGO concerned with censorship. Bearing a fragile political mandate (and hence uncertain powers), none of the intergovernmental institutions dares think beyond its defined jurisdiction or contemplate structural change. They treat disappearances, torture, and racial discrimination as the only relevant events, as occasions for brief and episodic interventions. A government stops the torture, and the intergovernmental organization ends whatever type of intervention had begun — investigation and report, resolutions, and so on. The accountable power structures are generally left standing, apparently impervious to change.

We are not about to witness a cosmic transformation in the international order, under which governments surrender authority to an international agency for requiring structural change of a political, economic or social character. Those interpretive and programmatic "general comments" of the Economic-Social Committee of which Philip Alston spoke may not change the world, but they give us a corpus, they trace a program and give us a place to begin.

Karl Klare wondered whether seeking U.S. ratification of the International Covenant on Economic, Social, and Cultural Rights is worth the time of an American lobbyist. It is. Practically speaking, a ratified Covenant will lack the force of internal law—but it has great discursive power. The mere fight for ratification would expand the rhetoric of social action in this country; after ratification, the Covenant could be invoked as a legal and moral imperative for legislative action. Whether internal law or not, it remains a formal

international obligation. As the nation wrestles with the issue, the abstract right would take on concrete expression and become susceptible to programmatic development.

I believe the judiciary will play a marginal role in the construction of economic and social rights. An American legal theorist, Lon Fuller, observed that our courts as now constituted and understood cannot well handle "polycentric" problems implicating other functions of government and issues in complex ways. Yes, when the U.S. Supreme Court recognized the right of a criminal defendant to proper counsel, it compelled social spending and spurred a new institution of the public defender; but such arrangements are child's play compared to the complex requirements of the health right. The structural injunctions to which Roberto Unger referred, declining in use in recent years, provide a closer analogy. The right to health means tax systems and tradeoffs with other social spending, broad budgetary decisions, conceptions of consumer choice, reduction of carcinogens in the air, housing and nutrition. It will affect all of government, reaching as some have said even to education. Its realization requires the full engagement of the political process.

Of course the judiciary has a role in this process, such as providing a constitutional check on the nature of a health plan. But its major and vital work begins once legislation and regulations take form and broad aspirations have been resolved into a legislative scheme.

Albie Sachs

The rest of you have every right to be pragmatic, but we in South Africa are clinging to the right to be naïve. In the wider world, there's fierce competition: you must defend the rights you have and gain what rights you can. But in our world, it was totally unrealistic to be pragmatic. A pragmatic man in Nelson Mandela's position would have given up a long time ago and reconciled himself to second-class status in a racist society. But Mandela was naïve, and Mandela was unpragmatic, and that is why he has attained so much.

In the new South Africa, it is one of our major tasks to hold to that essential faith in justice and rightness, to believe that even these poor international documents might help us transform our world. If I'm less skeptical than some others in this room, it is due to our strong grassroots movement and our strong public consciousness of rights. In South Africa, we are seeking the political mechanisms to realize our ideals; here in the United States, around this table, we are groping for ideals to give substance to our institutions. The twain ought to meet.

I shall take advantage of Philip Alston's presence and make three

recommendations to the Economic-Social Rights Committee.

First: Try to encourage the participatory development of health charters. The trade union of health workers in my country became very interested in the concept of the right to adequate health. They brought out a publication and involved various branches of the profession in the definition of the right. Eventually, we might attach this charter to a constitutional bill of rights. Its authority would surpass ordinary legislation, but fall short of a constitutional provision, which is difficult to amend.

Other professions and interest groups are developing their own charters: a charter of human rights for women, a trade unionists' charter, a charter of workers' rights. The process does not involve lawyers in their libraries; it is the work of ordinary people in particular sectors of society, speaking out of their own lives. But this is only natural, for rights reside in the individual conscience, in the heart, not in the abstract. Perhaps the Committee should select a few countries for a trial run at participatory charters.

Second: Devote your attention to those aspects of the health right that have the force of first-generation human rights and appeal to our sense of fundamental justice. The concept of informed decision-making touches on the consecrated right to autonomy; the right against human experimentation recalls the right against torture. Applied to the health right, the established principle of equal protection could have a revolutionary impact. Rights like the health right are indivisible from the rights to life, dignity, equality, and choice.

Third: Emphasize the two words of the Covenant that Philip stressed, "take steps," and devote less energy to the question of violations. Our litigious proclivities are inappropriate in the context of economic and social rights, where we ask states to act in good faith. Governments that are pilloried for rights violations will not report faithfully to the Committee. Show your support, and perhaps they will give an honest answer.

Unfortunately, we human rights advocates are not ourselves honestly balanced. We insist on the importance of the maximalist position, as though anything less is unacceptable. For the purposes of our discussion, it is useful to construct a dialectic of extremes, minimalist and maximalist; but here at Harvard University, the center of establishment power, it is difficult to maintain the maximalist position for long. We cannot afford to be intransigent. We have to be concrete, developmental.

Philip Alston

Could you speak to us about the interim Bill of Rights drafted by the African National Congress?

Albie Sachs

In drafting the section on social rights, we looked to the International Covenant. We felt that the language of the Covenant speaks to conditions in South Africa, where social and economic rights are a matter of dignity and status. People are poor because they're black, they lack access to health care because they're black. They want to live as decently as white people have.

This section of the document enumerates the fundamental social, educational, and welfare rights of citizens. The legislature will convert these broad principles into positive rights; questions of what can be afforded, national priority, and competing claims will be resolved at that level. We have thought to make education a quantifiable positive right: to begin with, compulsory education in the urban areas up through standard six, to extend progressively through the rural areas. It is also possible to quantify some elements of the right to health care. All of the rights contained in this section are fully justiciable. A court may restrain the state or any private group or individual from interfering with the enjoyment of these rights—a rather controversial idea.

We did not include the right to work in our draft Bill, because we are not sure that anyone, including Mandela, can guarantee full employment within a satisfactory time period. The government's failure to deliver full employment would demean the entire document. Instead, we placed a duty on the state to reduce unemployment. In a similar sense, the citizen lacks a constitutional right to shelter, but the state has the constitutional duty to reduce and eliminate homelessness. When it comes to education, we are more positive and affirmative: it's the one area in which even the libertarians have made concessions.

The Bill explicitly creates several new institutions. A national health service will link health workers, community organizations, state institutions, private medical programs, and individual practitioners to provide hygiene education, preventive medicine, and therapeutic care for all. A human rights commission will promote general observance of the Bill's provisions and help enforce the right against discrimination. It has the power to investigate rights violations, receive complaints, and bring proceedings against offenders; it may also propose legislation to Parliament. An earlier draft contemplated two commissions, one for civil and political rights and one for social and economic rights, but my colleagues feared the

separation of controversial social and economic matters from the larger body of rights.

I hoped that news of our progress might encourage the Committee of which Philip despairs. We are encouraged by its work. Our draft Bill of Rights is not one of those periodical efforts by decent people that end up in the basket of lamentations.

Ken Anderson

When we heard Philip Alston express frustration over the inability of his Committee to pass beyond the abstract level of rights, I was reminded of a passage from Michael Walzer's book, *Spheres of Justice*. Walzer speaks of rights discourse as a postponement of genuine discussion, which must take place within an organic political community. Then we heard Albie Sachs's admittedly naïve enthusiasm for rights. At this moment in South Africa, rights rhetoric is a motive force; but perhaps different political communities demand different rhetorics. As an idealist, as one who longs to naïvely embrace some principle, I again want to open the possibility of an alternative language for the social good.

Does the American public perceive the lack of universal health coverage as a fundamental injustice? To those who possess health insurance, the concern is insecurity, not injustice. It would be a strategic mistake for a band of elite internationalists to force the artificial language of rights onto the organic political community that is the United States. Rights rhetoric simply wouldn't work here.

June Osborn

However much I share Ken's observations, I strongly disagree with his conclusions. For the longest time, I berated the United States on its public health program by comparing it to South Africa. Among the industrialized nations, only the United States and South Africa lagged behind on public health. Now I can say: look what they're thinking about in South Africa while we tinker with insurance companies and the inner workings of managed competition. When the current health care debate began in this country (during the Bush Administration), access was an acceptable word; since then, we've backslid.

But I see no reason to leave things where they are. I am encouraged by the handsome effort of the African National Congress. We in the United States need Albie Sachs's right to be naïve.

Jonathan Mann

Indeed, had Clinton stuck with the language of rights, we'd be in better shape for the health care discussion to come.

Michael Mandler

One should distinguish between the principled assertion of a right and the strategic use of it. Principled assertion sustains the right until a grudging society is ready to accept it; but in the meantime, the rights advocate must resort to a different discourse.

For the health care debate in the United States, the language of merit has more currency than the language of right. Many Americans reject the concept of an unconditional right to health care: they wish to reserve health care to those who deserve it. To build a political coalition on the issue, the activist must answer such people on their own terms. The activist might, for instance, argue that even those who genuinely attempt to insure themselves against sickness and disease can, under the current system, find themselves without continuing health care. The rights advocate therefore can argue that the current system denies benefits that are justly deserved.

Harvey Fineberg

Yes, Michael Mandler is quite right. We must not confuse the moral imperative to act with the political imperative to act wisely. The moral imperative to ameliorate social and economic conditions blinds us to the political necessity of gradual implementation.

Keith Hansen

Well, then, if we must gear our rhetoric to organic or constitutive political communities, where does the language of social and economic rights fit in? It fits in precisely at the international level, the highest level, as an expression of aspiration to which the rest of world can appeal.

Paul Farmer

I must confess my pessimism for the international human rights movement. I have listened long and hard to Haitians talk about the multinational organizations and their ostensible expressions of solidarity with the Haitian people. Philip Alston's description of the trouble in his Committee only confirms my suspicions.

Before I arrived in Haiti, I had supposed that human rights activists were warmly welcomed. To the contrary, the impoverished people in the progressive grassroots movements suspect the hu-

man rights community of opposition to economic and social reform. The representatives of the United Nations and the Organization of American States who are now in Haiti are practicing a policy of non-partisanship. They are situating themselves in the center, perhaps the sensible place to be, but from the people's perspective, they appear very much to the right, or rather high above. Indeed, this is not a "critique from the left," as some would have it: it is a critique from below. Listen to the voices of the progressive poor in Haiti and other Latin American countries. They are quite articulate, even if they do not share our opinions.

We must find alternatives to the international bureaucracies and the elite officials with entrenched interests. For example, we must circumvent the human rights activist who would happily take the helm of a military government. (That is what happened in Haiti, after the 1991 coup—a U.S. funded human rights figure became the army's first puppet and apologist.) I take heart from people like Henry Steiner and Jonathan Mann, the organizers of this roundtable, who would work for economic and social rights independently of the bureaucracies. I only hope that there is room in this new world order for their criticism.

Henry Steiner

Would you speak more about the popular rejection of rights talk in Haiti? Isn't it possible that any elite group would attract the same scorn, whatever their "talk"?

Paul Farmer

Let me give a concrete example. A well-known Haitian folk singer entitled one of his albums, *International Organizations*. The title song features this line: *International medicine is not for us/ It's there so people can sit around and drink wine/ And help the elites further their causes*. So you see, the popular rejection of the rights talk is quite explicit; its targets are well-defined. It targets those with a narrow definition of rights: the right not to get hauled out of Mass and shot in the head before U.N. observers, as happened last week to a prominent Aristide supporter. This murder elicited strong reactions from UN and OAS observers, and also from the U.S. administration. Many of the Haitians I know well believe that the assassination caused an international uproar because the victim was a well-to-do (some said "white") businessman. For the anonymous poor who are killed every night, there are no such reactions, and this is because human rights, like other commodities, remain to a large extent the domain of the privileged.

Philip Alston

I, too, have become increasingly uncomfortable with certain elements of the human rights movement. Civil society, a potentially powerful idea for democratization, looks more and more like a creature of the Ford and Rockefeller Foundations. Any attempt to invest civil society with real autonomy must confront the international bureaucracies, which see it as an obedient service provider.

Henry Steiner

It is futile, I have come to think, to begin with a universal social or economic right and then struggle to implement it, whatever "it" is. As Albie Sachs said, rights language is often the articulation of something within the breast. Intuition and experience guide us in our articulation of basic requirements of human dignity. We proclaim the right to health, but not the right to a stoplight at the corner or the right to a paved road.

The universal right to health declared in the International Covenant may well evolve to assume a detailed content, to become programmatic, like the Equal Protection clause of the United States Constitution. That clause lay effectively dormant for decades. A half-century ago, it was revived, and by ongoing judicial elaboration and political pressures it has become a vital and potent force for social reconstruction. Today's image of equal protection would have found little resonance in popular opinion when the clause became part of the Constitution. At the start of this process, there was no developed right to be realized, but rather a right to be developed. We needn't pretend that the right to health is a known quantity.

Adetokunbo Lucas

I fear, Henry, that we are moving against the tide. Developing countries are pressured to leave the welfare of their people to market forces. Education will worsen, poverty will spread, and a few people will become exceedingly rich. The United States leads the way. A current UNICEF report indicates that twice as many U.S. children live in poverty than the children of other developed nations. While we talk of health and education, the world is moving in another direction: every man for himself and the devil take all.

Keith Hansen

I want to underscore the lesson of Paul Farmer's observations. Rights flourish in the soil of the people; intervening institutions, especially non-economic international institutions, are liable to weakness and domination by the elites.

Earlier this summer, I was called for jury duty on a criminal case. The only lawyer on the panel, I was prepared to conduct a little seminar on Fourth Amendment rights for my ignorant fellow citizens. Well, my fellow citizens could teach a course in criminal procedure. From cop shows and news reports, they've learned the *Miranda* warnings (an important right of suspected criminal defendants) to the letter. They know where the burden of proof lies, and what the defendant can and cannot do. The Supreme Court could close up shop tomorrow, and the public would continue to enforce the doctrines it has internalized. Had we grown up with social and economic rights, we'd have internalized them, too.

Knowledge is the ultimate form of empowerment. The South African Commission on Human Rights, proposed in Albie Sachs's draft Bill, has the authority to disseminate information publicly for the realization of rights. Let the Economic-Social Rights Committee shout the international rights to the world.

Annex A

The Participants

All participants spoke in their individual capacities rather than as representatives of institutions with which they were affiliated.

Philip Alston is Professor of Law and Director of the Centre for International and Public Law at the Australian National University, Canberra. He has written extensively on human rights issues and played an active role with respect to economic and social rights within the U.N. human rights system. He served as Chairperson of the U.N. Committee on Economic, Social and Cultural Rights.

Kenneth Anderson was formerly Director of the Arms Project of Human Rights Watch, and is now General Counsel of the Soros Foundations. He has taught courses on human rights at Harvard Law School and has written several articles in that field.

Troyen Brennan is Professor of Law and Public Health and Director of the Program in Law and Public Health at the Harvard School of Public Health, as well as Associate Professor of Medicine at Harvard Medical School. His research interests include medical ethics, health law and public health policy.

Paul Farmer is Assistant Professor of Social Medicine at Harvard Medical School, and the director of the Institute for Health and Social Justice. As physician and anthropologist, he has worked extensively in community-health efforts in rural Haiti. His books include *Aids and Accusation* and *The Uses of Haiti.*

Harvey Fineberg is Dean of the Harvard School of Public Health and Professor of Health Policy and Management on that faculty. As activist, decision-maker and author, he has been a leading figure in the field of health policy.

Lawrence Gostin is Professor of Law, Georgetown University Law Centre, and Professor of Public Health Policy at the Johns Hopkins School of Hygiene and Public Health. He is Director of the Johns Hopkins/Georgetown Program on Law and Public Health, and was a member of the President's Task Force on National Health Care Reform.

Keith Hansen manages social sector portfolios for the World Bank in South Africa and Zimbabwe, with a focus on promoting universal access to basic health and education. Trained as a lawyer and an economist, he has also worked on human rights issues in both the United States and international contexts.

Karl E. Klare is George J. & Kathleen Waters Matthews Distinguished University Professor and Professor of Law at Northeastern University. His extensive writing concentrates on labor and employment law and on legal theory.

Adetokunbo Lucas is Professor of International Health at the Harvard School of Public Health. He had earlier been active in clinical and community medicine in his native Nigeria, and from 1976-86 he directed the Special Program for Research and Training in Tropical Diseases that was involved in over 2,400 projects in one hundred countries.

Michael Mandler is an assistant professor of economics at Harvard University. His writing has focussed both on technical issues in economic theory and on policy questions. His forthcoming book on economic theory, *Dilemmas in the Theory of Value*, will be published in 1995.

Jonathan Mann is François-Xavier Bagnoud Professor of Health and Human Rights at Harvard School of Public Health. Dr. Mann has extensive state, national and international public health experience, and was founding director of the WHO Global Program on AIDS.

Martha Minow is Professor of Law at Harvard Law School, where her scholarship includes articles about the treatment of women, children, persons with disabilities, and members of ethnic, racial or religious minorities. She is the author of *Making All the Difference: Inclusion, Exclusion and American Law* (1990).

Martha Nussbaum is University Professor and Professor of Philosophy, Classics and Comparative Literature at Brown University. From 1986 to 1993 she was a Research Advisor at the World Institute for Development Economics Research (WIDER) of the United Nations University. She is the author of various books and articles on ancient Greek and modern moral and political philosophy, and editor, with Amartya Sen, of *The Quality of Life* (1993), and, with Jonathan Glover, of *Women, Culture, and Development* (1995).

June Osborn was Dean of the School of Public Health at the University of Michigan from 1984 to 1993, and is Professor of Epidemiology at that school and Professor of Pediatrics and Communicable Diseases at the Medical School. She chaired the U.S. National Commission on AIDS from 1989-93 and is now a member of the steering committee of the Global AIDS Policy Coalition.

Albie Sachs was at the time of the discussion Director of the South Africa Constitutional Study Centre, University of the Western Cape, and a member of the Constitution Committee of the African National Congress. In October 1944, he was appointed to his country's newly created Constitutional Court.

Henry Steiner is Jeremiah Smith, Jr. Professor and Director of the Human Rights Program at Harvard Law School. His teaching and writing have addressed a range of human rights issues.

Roberto Unger is Professor of Law at Harvard Law School. His extensive writing has concentrated on social theory, including *Politics: A Work in Constructive Social Theory* (3 vols. 1987), jurisprudence and political and socioeconomic issues of contemporary Brazil.

Annex B

Suggested Reading

Some participants have suggested further reading for those interested in pursuing the themes of the discussion. The articles and books listed below are not then meant to represent a "basic bibliography" in the field, but rather to open the way to further exploration.

Alston, P., *US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 88 Am. J. Int. L. 365 (1990).

Alston, P. and Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 Hum. Rts. Q. 156 (1987).

Chomsky, N. and Herman, *The Political Economy of Human Rights*, 2 vols. (1979).

Chapman, A., *Exploring a Human Rights Approach to Health Care Reform* (AAAS Publication 1993).

Cover, R., *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. of Law & Relig. 65 (1987).

Frank, J., *The New Public Health*, 1993 Annual Review of Public Health 469.

Fuenzalida-Puelma, H. and Connor, *The Right to Health in the Americas: A Comparative Constitutional Study* (1989).

Gostin, L. and Lazzarini, *Human Rights and Public Health in the AIDS Pandemic* (1995).

Gostin, L. and Mann, *Towards the Development of Human Rights Impact Assessment for the Formulation and Evaluation of Health Policies*, 1 Health and Hum. Rts. 58 (1994).

Hartog, H., *The Constitution of Aspiration and "the Rights that Belong to Us All,"* 74 J. of Amer. Hist. 1013 (1987).

Leary, V., *The Right to Health in International Human Rights Law*, 1 Health and Hum. Rts 24-56 (1994).

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 9 Hum. Rts. Q. 122 (1987).

Mann, J.M., Gostin, Gruskin, Brennan, Lazzarini and Fineberg, 1 Health and Hum. Rts. 6-23 (1994).

Minow, M., *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).

Nussbaum, M. and Sen, A., eds., *The Quality of Life*. Clarendon Press (1993).

Nussbaum, M. and Glover, J., eds., *Women, Culture, and Development*. Clarendon Press (1995).

Pernick, M., *A Calculus of Suffering* (1985).

Scott, C. and Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. Pa. L. Rev. 1 (1992).

Steiner, H., *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement* 17-50 (1991).

Türk, D., *The Realization of Economic, Social and Cultural Rights*, Final Rep: UN Doc. E/CN.4/Sub.2/1992/16.

Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights," in Alston, P. and Tomasevski (eds.), *The Right to Food* 97 (1984).

Walzer, M., *Spheres of Justice* (1983) — Preface and Ch. 3.

White, L. *Mobilization at the Margins of the Lawsuit*, 16 N.Y.U. Rev. of Law and Social Change 535 (1988).