

# *Human Rights* AT HARVARD

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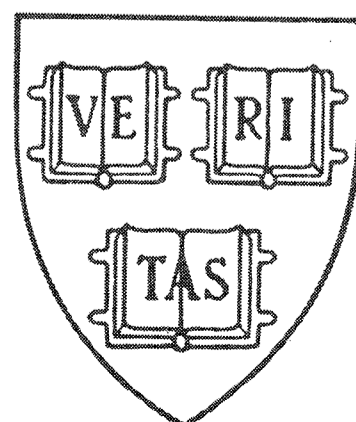
*Interdisciplinary  
Faculty Perspectives on  
the Human Rights Movement*

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*A Symposium held at  
Harvard University on  
March 11, 1995*

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Human Rights Studies



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## Preface

Harvard University created in 1994 a Committee on Human Rights Studies. Its members come from a broad range of faculties, departments and disciplines. Their names appear on the facing page.

The decision to form such a committee recognized the sharp growth over the past decade or so of courses and scholarship in international, foreign and comparative human rights at Harvard University. There are now courses in numerous disciplines that examine primarily human rights issues or that give such issues serious attention. In many other instances, human rights concerns figure as one of a course's themes. The disciplines involved include law, public health, government, international relations and organizations, moral and political theory, economics, environment, religion and anthropology. Two faculties have special programs concentrating on international human rights: the Human Rights Program at the Law School, created in 1984, and the François-Xavier Bagnoud Center for Health and Human Rights at the School of Public Health, created in 1993.

This Committee facilitates networking throughout the university among teachers, scholars and students concerned with human rights. In 1995, it organized a symposium entitled, *Human Rights at Harvard: Interdisciplinary Faculty Perspectives on the Human Rights Movement*. The purpose was both to present stimulating discussions, and to underscore that human rights studies have become a university-wide phenomenon.

This booklet presents the remarks of the speakers (generally edited and shortened), as well as some discussions between the speakers and members of the audience.

Henry J. Steiner  
Committee Chair



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## Symposium

# *Human Rights at Harvard*

## Interdisciplinary Faculty Perspectives on the Human Rights Movement

### Topic I. International Human Rights and the University

Henry Steiner

A half century ago the international human rights movement developed out of the Nuremberg trials and a few terse but fertile provisions in the United Nations Charter. Three years later the Universal Declaration of Human Rights gave the movement its grand constitutional expression. States, at once the creative authors and systematic violators of human rights norms, built over the following decades an imposing structure of treaties and international organs. That structure brought within positive international law many humane ideals that had long been debated in moral and political thought. Nongovernmental human rights organizations rapidly developed to monitor, propose, and apply pressures for compliance by states with such ideals.

This human rights movement of such diverse components has brought striking innovations to the international system. Most significant, the new norms and institutions extend classical international law to regulate how a state governs or acts toward its own citizens. Matters long considered to be the state's exclusive business become fully part of international debate. Indeed, the movement reaches beyond this expansion of international legal and political order. It involves as well the related spread of Western-style constitutionalism and bills of rights to states of radically different traditions and circumstances.

All recognize the frailty of the new institutions in actually arresting violations, and hence the ominous gap between norm and realization. Nonetheless, the movement now forms an indelible part of our legal, political and moral landscape. Although subject to manipulation and turned by some regimes to their own malign uses, the movement's dominant thrust has been unmistakable. It has everywhere shaken up oppressors by spurring demands for a fairer society and better life. The ideal or ideology of international human rights has become a part of modern consciousness, a lens through

which to observe and evaluate the conduct of states, a subject in its own right as well as a vital component of many others, a potent rhetoric and aspiration. In that process, the discourse of human rights has become near universal, reaching beyond the elite, educated circles that first gave it currency to influence popular attitudes and shape popular demands.

A movement of such inventive and audacious ideas inevitably sets its mark upon the academy. Its very breadth gives it diverse points of entry into courses and scholarship. Several decades ago, rare was the university whose curriculum included international human rights studies. Today one no longer questions whether such studies should be offered but rather how they could be ignored.

The curriculum displays this influence of international human rights in fields as varied as law, public health, government, international relations and organizations, moral and political theory, economics, environment, religion and anthropology. Such courses examine economic and social rights as well as the classical civil and political rights, group or collective rights as well as the dominant individual rights, children's rights as well as rights of indigenous peoples. All the basic themes of the human rights movement figure in this enriched curriculum: the significance of protection of human rights for peace or war, the tension between universalism and cultural relativism, the influence as well as the erosion of the public-private divide, the links between human rights and democratization, the dilemmas of ethnic identity and self-determination, the effects of human rights on the growth of markets or economic development, the different paths of political cultures that are rights-oriented or duty-oriented.

For universities within liberal democracies, the ideals of international human rights are to some extent familiar themes of traditional subjects. The concept of individual rights and the means for their protection figure prominently in the study of Western history, government, and political and moral theory. Rights play a central role in the constitutional argument examined in the law faculties.

But even in such universities, vital problems posed by the human rights movement are unfamiliar. The challenging, puzzling questions stemming from the internationalization of human rights and their spread to different parts of the world expand and transform traditional studies. Thus the movement stimulates fresh inquiries and activities: working out philosophical bases for the international ideals, exploring those ideals' origins and development, wrestling with the inevitable conflicts within and among them, critically examining the aspirations and strategies of human rights advocates, interacting with the movement by facilitating students' participation in clinical work and by drawing activists into



university studies.

Consider, for example, the task of moral, political and legal theorists to lay foundations for international human rights that could persuade peoples across cultures—and in the process to wrestle with the competing claims of universalism and cultural relativism. How much more complex it becomes to justify a system of individual rights as part of a constitutive framework for government, when the setting expands from one state or cultural tradition to the world's full diversity. Natural rights or contractarian metaphors may speak powerfully within one tradition but have little resonance within another.

Or consider the critical bite of the new international norms that affect all cultures and regions. Of course those norms indict the severe repressions, the slaughters and terrors. But more is at issue. Domestic problems of the liberal democracies come under sharp scrutiny from this novel international perspective. Reform legislation on issues of gender as well as women's political mobilization in many such states draw strength from even as they strengthen international human rights. Economic and social rights influence public debate on issues like health care or education.

Similarly, many traditional institutions of the non-Western world face fresh challenge. Universal human rights norms raise serious questions about, say, aspects of Islamic law, African customary practices, or cultures of indigenous peoples. Often the new legal ideals may both justify and criticize these institutions, as by valuing freedom of religion while subjecting some religious teachings to constraining norms, or by valuing the survival of the diverse cultures of indigenous peoples while holding some of their practices to universal standards.

The premises to the traditional international system must now be reassessed and redefined. By holding states' internal conduct to international human rights standards, the new ideas weaken state autonomy or sovereignty. They force us to rethink such basic concepts in legal and political theory, as well as ways of resolving the tension between state autonomy and international order.

Apart from its norms, simply in terms of illuminating the condition of the world, the human rights movement affects university study. The prolific nongovernmental human rights organizations, as well as the more effective among the intergovernmental institutions, investigate and report on violations of rights. This is indeed a growth industry—the business of describing the massive suffering of groups and peoples. Governments' systematic savagery and callousness become the stuff of headlines, human rights rallies, and condemnations both real and hollow.

With this knowledge so routinely on display, we cannot blink

the cruel and even demonic side of our human nature. No one region, no one people or ethnicity, holds a monopoly on it. We are all on display. Such information, inescapable within a democracy, leaves its mark on the sensibility and conscience of many entering students, and hence on what they wish to learn. We witness the fruitful dialectic between evolving interests of students and faculty, each tending to shape the other's. The world's dark underside forms part of the education offered by the elite university.

My preceding comments emphasize conceptual challenges brought to many university subjects and the related study of the historical and potential effects of international human rights. But we know the university's task to be deeper. It must engage in a searching, critical examination of the movement itself. That movement is hardly sacrosanct. The meaning of some of its fundamental ideals is sharply disputed. Conflicts arise among rights, among goals or aspirations, among different cultures and regions. Freedom of religion, for example, stands in a complex relationship to norms of equal protection and free speech. Resolution of these perplexing issues is far from obvious. The university must join such debate.

The study of failures can be particularly instructive for understanding; they underscore the hazards that movements of high ideals tend to blot out at the start. Consider the movement's stunning success in setting standards alongside its frustrations and defeats in seeking to enforce them. Many factors are surely relevant, among them the politics as well as the architecture of the new international institutions. That architecture requires ongoing evaluation and revision, for much of the effectiveness of international human rights depends on the degree to which norms are not free floating, but anchored in competent international institutions that are committed to their implementation.

On all such issues, the university offers the essential environment for examination and criticism. It is *not* the movement, not merely another institutional advocate, but an educator, critic, and source of ideas for it. Relatively shielded from the everyday fray, the university is free of such confining roles in human rights work as legal advocate, political activist, state official or international bureaucrat. It does best by inquiring and stimulating without preoccupation about what may be politically strategic or correct for the movement.

Although its distance from daily engagement permits this more critical perspective, the university is at the same time part of a world in which suffering peoples struggle to realize the core values of human rights. Its stance toward the movement should not be understood as indifferent and dispassionate, for that movement touches too deeply many ideals of an open and just society that are

the university's own ideals: the equal dignity of human beings, freedom of inquiry and advocacy, broad political participation.

Involvement by the university with the concerns of international human rights should then take active as well as scholarly expression. Clinical work by students as well as special programs offer two frameworks for that involvement. Clinical experience brings students in touch with human rights figures and institutions and gives them a desired sense of engagement. It complements the classroom's learning with an invaluable appreciation of problems at the grassroots, and thereby assists in educating the human rights movement's future leaders. Special programs organize conferences on troubling or threshold issues. They assist activists with respect to one or another reform project or problem. They invite visiting fellows who are committed to the protection of humane values in their own states. In the process, such human rights programs both generate scholarship and make practical contributions. All these activities draw on and strengthen the links so prominent in human rights work between action and reflection, the personal and the political, feelings and intellect.

No single agenda should then define the university's reactions to the human rights movement. Rather we see diverse tasks that, effectively pursued, enrich each other: description and analysis, conceptualization and criticism, proposal and participation. Through involvement with the movement in so many ways, the university accelerates the change in consciousness that began fifty years ago. Students perceive the study of international human rights as a natural part of a humanistic or professional education. And so it is.

### **Jonathan Mann**

This symposium is of singular importance, symbolizing the emergence of human rights studies as a legitimate subject for university research, education and service.

The university has an enormously important potential role in advancing our understanding of human rights, both in theory and in practice. The traditional strengths of the academy—intellectual independence and integrity—can be joined with service (dare we say "activism") to help advance respect for human rights and dignity throughout the world. A richer environment for analysis and reflection about human rights than a University, diverse in expertise and forms of social engagement, cannot be imagined.

In the domain of human rights, the University also offers its unique gift: the intellectual and practical "space" within which discussions about cultural relativism, meanings and discourse can proceed in a privileged manner, relatively insulated from the press-

ing political or economic agendas which otherwise so interfere with meaningful dialogue.

Literacy about human rights is urgently needed within the University itself. Within my own professional circle, I can testify, both through personal history and surveys among colleagues and students, about the prevailing gaps in knowledge about human rights concepts, documents, institutions and practices. Yet progress is being made. In addition to the Law School, both the School of Public Health and Harvard College itself now have courses on human rights. Indeed, since 1990, all graduates of the School of Public Health receive two scrolls at commencement: the diploma they have earned; and a copy of the Universal Declaration of Human Rights, their common birthright. As the scrolls are distributed, the Dean reminds graduates that the Universal Declaration will be as important to their future work in public health as the Hippocratic Oath may be for medical doctors.

Perhaps this claim requires some explanation. At the François-Xavier Bagnoud Center for Health and Human Rights, we are exploring three dimensions of linkage between health and human rights. The first considers the impact of public health policies, programs and practices on human rights. Since much public health work is governmental, the health official can truly be held to a dual standard: protecting public health, while also promoting and protecting human rights. The negotiation of an optimal balance between health goals and respect of human rights norms is a requirement which engages both the public health and human rights communities.

The second linkage examines the potential of human rights violations to injure health. Thus, violations of the right to information regarding the dangers of cigarette smoking, or regarding the benefits of use of condoms, have measurable health impacts, as do violations of the right to association, a right that would allow drug users or sex workers to work together to protect themselves from health threats. We proceed on the assumption that violations of each and any right has such effects on health, which remain to be described and assessed.

The third and perhaps most important linkage can be expressed by the idea that (as has been pointed out) "promoting and protecting health and promoting and protecting human rights and dignity are inextricably linked". This follows from awareness of the World Health Organization's definition of health as "physical, mental and social well-being". In turn, public health is defined (by the U.S. Institute of Medicine, 1988) as "assuring the conditions in which people can be healthy". Thus, the critical question becomes: "what are these critical, fundamental pre-conditions for people to achieve

maximal physical, mental and social well-being?"

To many, the answer is "medical care". Yet it is clear that medical care, as important as it may be to us as individuals, makes only a minor contribution to a population's health status. Indeed, a recent U.S. government report estimated that only ten percent of the preventable premature deaths in this country could have been averted with medical care; similarly, a recent study determined that only one-sixth of the gain in years of life expectancy in this country during this century could be attributed to medical care.

Medical care is only a small part of the health picture; the major determinants of health status, in this country and throughout the world, are societal. Most analysts have stopped at the socioeconomic gradient (the rich and well-educated live longer and healthier lives than the poor and poorly educated). In contrast, we believe that socioeconomic status, at least as currently categorized by years of education, current job and income, is actually a surrogate for a more basic, underlying set of issues. We consider the status of realization of human rights, and respect for human dignity, to provide a more revealing framework for understanding health.

To illustrate with a simple, real-life example: today in Uganda (and other parts of East and Central Africa) married and monogamous women are increasingly infected with the human immunodeficiency virus (HIV). Indeed, being married is now considered a "risk factor" for HIV infection in some areas. Initially, we thought this might be due to a lack of information about AIDS, or unavailability of condoms in the marketplace. In fact, we discovered that women cannot refuse unwanted or unprotected sexual intercourse with their husbands, even if they know he is HIV-infected. The reasons are very concrete: fear of beating (without recourse to civil remedies); and fear of divorce (without property or other rights, thus leading to the equivalent of social and economic death). Clearly, women's rights and status were the critical factor. In turn, this analysis led the Ugandan women lawyers group to work to change laws governing property distribution after divorce, as well as laws on marriage and inheritance, as "anti-AIDS" measures!

We are therefore exploring, on many fronts, the complex and vital relationships between health and human rights. Might such analyses also be relevant to other disciplines and other faculties within the University?

## **Topic II. United States and Global Human Rights**

**Henry Steiner** (panel chair)

How does or ought the United States react to the rampant brutality and denial of basic human rights around the world? Are such events elsewhere any concern of this country? If so, how ought that concern be expressed— through participation of the U.S. in multilateral organizations, or also unilaterally through censure, conditions to aid and trade, regulation of U.S. corporate business abroad, and so on? Such are the themes of the three speakers on this panel.

**Bryan Hehir**

In the changing context of human rights and United States policy, the 1990s poses a new set of challenges. The cold war's focus on security has given way to emphasis on political and economic concerns. The issues facing policymakers have become increasingly complex, while situations involving extraordinary human rights violations are on the rise. We stand at the threshold of a new era in the human rights debate: that of human rights in the post-cold war framework.

Before addressing these challenges, let me retrace the history of the human rights movement. The 1990s can be seen as the third stage of the human rights debate. Prior to the UN Charter, most legal scholars and governments took the position that human rights did not impede the right of the sovereign state to be monstrous to its citizens. As far as international law and other governments were concerned, human rights could suffocate within the boundaries of the sovereign state.

The first stage of the human rights debate arose with the signing of the Universal Declaration of Human Rights and the drafting of the major human rights covenants. Although new principles affirmed the responsibility of states to individuals, the logic of anarchy remained. There was no new structure of international relations to accompany the new framework of principles. Moreover, as the UN system became embedded in the cold war, states' interest in human rights issues declined. Although the United States was a noticeable participant in the early standard-setting phase of the human rights movement, U.S. policy from 1948 to 1970 paid scant attention to it.

In the second stage of the human rights debate, during the 1970s and 1980s, the United States moved from mere affirmation of human rights principles to an attempt at policy implementation. Various initiatives in Congress gave force to this trend, including the influ-

ential Fraser hearings in 1973 in the House of Representatives on human rights and foreign policy. From such initiatives emerged the Bureau of Human Rights and Humanitarian Affairs, together with the annual State Department human rights reports.

In the executive branch, President Carter's administration marked the shift away from the approach of previous administrations. Henry Kissinger, who served as Secretary of State under President Nixon, had opposed the premise that human rights should be integrated into broader foreign policy considerations, arguing that such a premise was a typical example of moralism set loose in the world, and that good intentions would produce bad consequences in moral and practical terms.

In contrast, President Carter included human rights in his policy considerations from the start. The era thus marked the shift to application of human rights principles in U.S. foreign policy. Yet, the Carter administration engaged in a sliding scale application of human rights. Where security concerns were higher, as in Korea, the administration explicitly balanced foreign policy norms with human rights concerns. In the Middle East, there was no administration comment whatsoever on human rights.

The affirmation of human rights in both the legislative and executive branches during the 1970s and 1980s created a context in which non-governmental organizations (NGOs) could take on new significance in the human rights debate. These NGOs developed an independent vision about human rights. Although not official actors in the state system, they nonetheless acquired a quasi-political significance in the human rights debate because of their influence on such actors.

Throughout these first and second stages, the cold war underscored the tradeoff between security issues and human rights. The question during those decades had been how much of a focus you could give to human rights without compromising important foreign policy goals. There were the usual range of views. Some argued in favor of attention to human rights for domestic political reasons. Another argument, advanced by Senator Moynihan and Secretary of State Brzezinski, was that it was to the advantage of the United States in the cold-war struggle to press human rights issues. Finally, the cold war produced a larger budget for foreign affairs that gave tools and instrumentalities with which to advance these concerns.

After the waning of the cold war, these elements collapsed: the primacy of the human rights debate, the budgetary largess and the argument for the instrumental use of foreign policy stressing human rights. Such policy is no longer directed against a single threat or single system. Questions remain about the protection and promotion of human rights, but they do not fit into a sub-theme of pursuing

a distinct foreign policy goal to which human rights argument is instrumental.

Today we lack a single, dominant, and global threat, military or political, to our security. We talk instead of individual nations in which there are struggles like that between radical "fundamentalism" and human rights that lead us to moderate our human rights advocacy. In Algeria and Turkey, for example, the argument goes that if you press human rights issues, you may seriously weaken a government which, while not good, is better than the alternative.

Another factor in the current foreign policy debate concerns the focus on political and economic issues. In contrast to security issues, which have a zero-sum quality, the political-economic framework creates a mixed-interest game in which pressing your partner or adversary may threaten the entire framework and therefore your own interests. Thus, tying human rights to trade policy raises more complex concerns than when human rights was tied to military assistance.

This complexity and the multiplicity of interrelated issues become striking in the debates over most-favored-nation treatment for trade with China. Not only do trade and economic questions arise, but also security considerations regarding, say, China's role in North Korea. Human rights are tied to questions of China's political future, to consequences of trade restraints for American businesses and consumers, to non-proliferation of nuclear weapons. This multiple-issue approach makes the political assessment of human rights concerns more difficult than in the past.

The final question in the 1990s human rights debate is how to define the cases or situations that we face. They range from individual human rights violations, to a state in chaos, to genocide. Are situations like Rwanda and Somalia adequately captured when described as human rights violations? My own sense is that we are dealing with phenomena of human rights raised to the Nth power. We face both human rights questions and extraordinary questions of genocide. In such cases, our responsibilities grow beyond the normal scope of the human rights debate.

This, then, is the new context of the human rights debate: the diminishment of security issues, the rise of political and economic issues, the multiplicity of concerns and the problem of extraordinarily serious human rights violations.

What should be the role of the university in this debate? I think it is to provide the philosophical foundations for understanding and dealing with these issues. First, what is a "right"? Does it include such matters as the right to health care? Second, we must address the cultural relativism argument. Third, we must question the nature and scope of our foreign policy. We must address the tradeoff



between multilateral and bilateral policy.

We must also question the policy vision relating democratization to human rights. These are two different goals, for democratization embodies different notions than human rights. In the post-cold war era, it is the promotion and protection of human rights itself that offers policymakers a foundation upon which to build an effective U.S. foreign policy. That should be our first goal.

### **Stanley Hoffmann**

Prospects for America's human rights policy do not look good. The present Congress no longer talks about human rights, while the administration has been inconsistent on the issue, staggering from one extreme to another. We have seen both the U.S. restoration of the democracy of President Aristide in Haiti and the complete debacle of U.S. policy in the former Yugoslavia. In between these extremes lies the American humanitarian intervention in Rwanda, which was extraordinarily late and limited, as well as the mission in Somalia, inherited by this administration, which became partly a fiasco because of confusion over what that mission was. China posed a complex tradeoff for U.S. human rights policy, but it ultimately ended in U.S. capitulation.

The U.S. has backed away from a stronger human rights policy for several reasons, including the declining utility of human rights as a useful anti-Soviet weapon. Another reason is found in the pervasive fear of both Congress and the administration that they might undermine friendly governments by pushing too hard on human rights. Evident illustrations include the case of Turkish human rights violations against the Kurds and the Egyptian government's violations against radical Islamic elements.

Rather than linger on gloomy prospects, however, I would like to offer a plea for the revitalization of human rights in American foreign policy. Such a revitalization makes sense in both moral and political terms. Human rights constitutes a moral obligation if we want to build a new world order. Helping to construct such an order has both implicit and explicit normative dimensions. To make human rights a foundation stone for such an order could be a rallying point, if only for a fragile minority of democratic states.

When talking about moral obligations, however, we must also deal with objections to the human rights approach. The most dangerous of these objections are the relativist critiques, sometimes—wrongly—labelled the "Asian objections" to universal human rights. The arguments that the human rights approach is too Western, too individualistic or neglects local traditions are simply specious. The real enemy to community is the state, not the human rights corpus.

It is states that often destroy local communities, subordinating them to nationalist ambitions.

Moreover, these communities that we now celebrate—in the West as well as in Asian cultures—used to be hotbeds of oppression and racism. There is nothing sacred about communities as such. When certain types of atrocities are committed, we must break with a cynical relativism and return to the position of Albert Camus, to say that certain things can only provoke rebellion.

Another common objection to the human rights approach is that we shouldn't press too hard since human rights will automatically follow economic development. The historical record, however, suggests that not all economic development benefits human rights. Indeed, economic growth can be accompanied by an enormous rise in inequality. Development is one thing, promotion of human rights is quite another.

Human rights as a basis for foreign policy makes political sense. We can no longer view international relations as consisting of relations among sovereign states that accept certain restrictions on their sovereignty. There are now three levels in the international system: the level of inter-state relations, the level of states and private actors caught in the maelstrom of the international economy, and finally, within states, the restive peoples and factions claiming a role of their own that may threaten the traditional conceptions of state sovereignty and the interstate system.

In this complex system, the human rights approach is centered on individuals. Groups that exist—whether families, ethnic groups, nations or states—are associations of individuals. These associations have value only insofar as they express the values and life plans of those individuals. They become illegitimate the minute they become oppressive. Human rights protects individuals from multiple forms of arbitrariness, particularly from states and groups that have large arsenals of oppression. The array of abuses against individuals is enormous, including political and civil as well as economic and social violations. They range from simple cases of people being thrown into jail to cases of genocide and massacre.

We must be attentive and react to the elementary human rights violations lest they lead to big ones. A good beginning would be to recognize the threats to individual human rights that stem from the globalization of the international capitalist economy. No market can function outside of a framework of rights, particularly property rights. However, a market can lead to extreme inequality, which may take forms that are exclusionary and highly undemocratic.

This global market that we celebrate can ruin within 24 hours the monetary and economic fortunes of a country. It is politically irresponsible, accountable to no one. In this arena, human rights policy

can give some direction to ensure that the economic development we promote is "human" by providing a common floor for individual welfare. One needs a common floor of rights to mitigate against the unevenness of economic development. Such a welfare floor would be a useful vaccination against any dangerous backlash from global interdependence, such as xenophobia and nationalism that inevitably undermine human rights.

We must also acknowledge the human right to peace. States often don't particularly want peace, but individuals do. We should restore Kant's idea of the right to peace as an individual right. A good example of this lies in the area of non-proliferation of nuclear and other weapons of mass destruction. Yet, in its mindless drive for domestic employment, prosperity and growth, our present administration has contributed to proliferation by becoming a monopolist in the export of weapons. The United States now accounts for 75% of the weapons sold worldwide.

Another threat to human rights stems from the disintegration of states, whether from ethnic, religious or ideological splits. Often the degree of violence rapidly escalates to the stage of systematic human rights violations. A human rights policy should therefore provide guidelines and rationales for different forms of intervention. When conflict results in massive, gross violations of human rights, then intervention—including the resort to force—is justified.

In this respect, nothing is more discouraging than the Yugoslav precedent. The United States, the Europeans and the Russians have allowed the Serbs to use force in a way that totally prejudged the outcome of the conflict. You cannot settle fairly or with justice a conflict over borders or rights of ethnic groups if the most powerful of the groups successfully resorts to violence. In addition, there have been genocidal atrocities committed in the former Yugoslavia. We said we would never tolerate that again, but we have. The West failed to protect individuals against genocide, massive rapes and ethnic cleansing.

When one talks about violence resulting from the disintegration of states, we have to deal with countries threatened by extreme Islamic fundamentalism. These movements may be dangerous for human rights, but it is short-sighted for the United States to tolerate brutal repression of them by governments friendly to the U.S. We saw what such a strategy led to in Iran. The only way to deal with the problem is, when possible, to promote a dialogue between the governments and these elements. The resort to oppression is counterproductive. When no possibility of dialogue exists, we still have an interest in prodding governments to clean up their own performance as one effective way to respond to a fundamentalist challenge often based on a government's corruption, incompetence, and cal-

lousness to popular needs.

U.S. foreign policy must recognize that human rights and democracy are two different things. The promotion of democracy is hard to do from the outside; it is more complex than setting up elections. Some forms of democracy are majoritarian and can be bad for human rights. We should recognize that there are different forms of democracy. The foundational approach of human rights has the virtue of being more universalizable than simply democracy.

Finally, the United States should take advantage of the human rights weapons in its own arsenal. Although it is good to resort to multilateral organizations, we must recognize that these organizations often are paralyzed and without resources. In such cases, unilateral action is necessary. Sanctions often fall on the wrong people, and conditionality in trade may be counter-productive. But the United States is powerful. Many countries want many things from it. We have been too eager to forget about human rights violations when we want something ourselves from other countries, as in the case of China. We often do not realize that other countries also need things from the United States, so we have failed to use this leverage.

Finally, in cases of gross human rights violations such as the former Yugoslavia, use of force may be necessary. In these instances, some casualties suffered by professional soldiers may have to be accepted in the name of human rights, as they are when force is deployed for cases of selfish national interest.

### **Debora Spar**

I'm going to look at these issues from the perspective of the intersection of international human rights and international business, focusing on international trade and foreign investment.

Is there indeed any intersection between the business community and human rights? We certainly see resistance to this notion from all sides of the political spectrum. From the business community we often hear that the business of business is solely to maximize profit, and not to deal in any way with issues such as human rights which deal with moral rather than financial imperatives. From the other side, meanwhile, moral philosophers would argue that corporations are amoral, or even immoral, entities that by definition have nothing to do with human rights. Nonetheless, I am going to argue that corporations may in fact be one of the better tools available to the United States government for promoting human rights. This can be so even as corporations pursue their economic interests in a global economy.

Let me begin by considering the areas in which multinational

firms are likely to encounter issues of human rights. The most important area of such overlap is in the field of labor. Companies hire people and set standards for their treatment; particularly relevant are practices involving child labor, prison labor, slave labor, and the like. The environment is also very much affected by the activity of corporations insofar as it is corporations that release substances causing environmental damage and thus affecting the health and living standards of the local population. Finally, corporate behavior is related to political structures, for corporations often exert a disproportionate influence on the local regime, becoming a force either for keeping a repressive regime in power or for promoting political change.

Given these deep-seated links, analysts have customarily assumed that corporations act to undermine traditional human rights goals and thus that corporations should be prevented from playing any role at all in advancing the cause of human rights. Analysts taking this viewpoint tend to argue that governments need to intervene to police the overseas activities of multinational corporations and prevent human rights abuses.

But consider what governments can actually do to serve the cause of advancing human rights. Sanctions are a potentially powerful tool, but a tool with an ambiguous record. Other than South Africa, there are few examples of effective use of bilateral or multilateral sanctions against an oppressive regime. Sanctions pose a further concern in that they often have adverse effects on the innocent populations of violating states. Even when sanctions are justified, it is often difficult to persuade corporations to comply with them, especially when competitors in the same or other countries are not doing the same. Sanctions then can stand as a strong symbol, but they are often of limited real value.

The record on promoting human rights through government trade policy is also spotty. Particularly in a democracy, it is difficult to formulate effective trade policies since so many competing interests bear on and transform trade relations. The recent example of China is a case in point. While the U.S. government has tried to tie most-favored-nation status to progress on human rights and to ban the import of goods made with prison labor, neither effort has proven successful. Instead, many U.S. corporations vehemently opposed government action that might deny them access to the Chinese market. Moreover, the strongest opponents of importing prison-made goods from China have not been human rights activists, but rather domestic producers of similar goods. In cases like these, we must recognize that governmental intervention on behalf of human rights can always be perceived as, and indeed often is, a cover for protectionism.

Government regulation of the actions of multinational corporations operating abroad is a more straightforward issue. The U.S. government, for example, can set standards for corporations to follow in their overseas activities. Such regulations, however, raises the issue of whether by doing so, the United States is imposing its law on other countries' internal life.

If, therefore, all the tools at a government's disposal are liable to encounter difficulties in advancing the human rights agenda, where else can we turn? Multinational corporations are a powerful, if non-obvious, possibility. Because they have the capital, technology, and know-how that developing countries deeply want, foreign firms can play an incredibly important role in catalyzing economic reform and development.

But does economic development necessarily lead to an improvement in human rights? Clearly it can go both ways, as the example of Singapore indicates. Still, without necessarily according primacy to political over economic rights, human rights are generally better served when people are brought out of poverty into some level of economic comfort. Ending mass starvation, for example, certainly improves the human rights situation. Economic development also creates a middle class with the interest and position in society to promote human rights goals. Particularly now, when foreign investment is often designed to service local markets, multinational corporations operating in foreign states have a greater stake in the welfare of local populations and thus in promoting higher standards of living.

Overall, even if multinational corporations occasionally do evil, they also in the aggregate have the potential to promote progress in labor, environmental, and political conditions in foreign countries. With regard to labor, large multinationals tend to raise wage levels in the poor countries in which they operate. AT&T, for example, raised wages and labor standards in Mexico. Many other companies have done the same in Poland, Indonesia and China. Moreover, corporations are often more amenable to unionization than are their local counterparts, since their standard operating procedures often involve union negotiations. Finally, we must remember that multinationals often replace local capitalists who are more exploitative employers.

Why do multinational corporations act to advance human rights goals? In some cases, they have committed corporate leaders. Levi Strauss, for example, has created schools in Pakistan and AIDS programs in the U.S. that clearly are not directly linked to the profitability of the company. Additionally corporations are increasingly subjected to public scrutiny that could damage their reputation—and thus their profitability—were human rights abuses to be revealed.

Companies like Reebok, for instance, advertise themselves as being friendly to human rights. Such publicity creates popular pressures on business to promote human rights standards as well as the public expectation that they will do so. In light of these pressures and expectations, Reebok hires investigators to examine its foreign factories and to ensure that labor standards are met. In this way, supporting human rights becomes for them, as well as for some of their competitors, an important, ongoing interest. With the globalization of brands, corporations cannot afford to allow negative reports about exploitation of labor in one market to hurt their public images in another. This consideration creates an incentive for companies to use safe technologies and to monitor levels of pollution emissions, in part to prevent legal and public-relations disasters similar to the Bhopal incident.

Whether corporations can influence the general political environment in the countries in which they work is a difficult question to answer. The presence of American firms in foreign states may in some cases lead to a greater concern for the individual. American companies tend to be meritocratic, and this can offer an alternative to less fair societal norms and ethnic prejudices that determine advancement in particular states. Finally, a lot of the American products sold in the less developed markets—including music, books, and blue jeans—create an image of individualism.

I don't mean to suggest that corporations are moral agents or central to realizing human rights goals. In pursuit of their own objectives, however, corporations can serve to promote aspects of the human rights agenda.

## *Questions and Comments*

### **Question from audience**

In my view, democracy promotes the protection of human rights. How can we envision a society protecting human rights that is not democratic? Shouldn't we aim at democracy first?

### **Stanley Hoffmann**

There are forms of democratic thought—particularly in the tradition of democracy associated with Rousseau in its belief in the general will and the public good—that don't care about human rights. Pure majoritarianism in a multi-ethnic society can be repressive to a minority unless special efforts are made to protect it. From the point of view of the policy maker, promoting human rights is a more realizable goal than promoting democracy, which must grow

largely from inside. It cannot be imposed by humanitarian intervention. On the other hand, it is more possible to try to persuade or pressure governments not to violate at least some basic human rights. These governments have often signed human rights treaties that have undeniably created legal obligations for them. Promoting human rights is simply a better tactic and generally a less demanding one than fostering democracy.

### **Bryan Hehir**

The goal of democratization is so ambitious as to create the danger that it may become the primary goal, so that the world's efforts will necessarily focus on a few areas that offer greater possibilities for its success. This we saw with respect to Rwanda; the lack of response stemmed from the belief that it was an impossible situation.

### **Question from audience**

Professor Spar, in your comments on capitalist activity in foreign states and how it relates to human rights, you made no mention of the development of the rule of law as it applies to commercial law. It seems that there may be a dynamic process of legal development that could start with commercial law, which then develops in the context of the increasingly global economy to influence other parts of the legal system. Perhaps in China, pressure may grow to develop parts of their legal system concerned with human rights.

### **Debora Spar**

This is a very important point. Although I do not think this happens in a conscious way, there is a connection. As commercial law is introduced and develops in societies trying to deal with international trade, law may grow where there has been none before. Corporations can often be actively involved in this process by pushing for better commercial laws with their stress on regularity and relative predictability. Such a process may begin to introduce the concept of the rule of law into societies that have previously been governed without reliance on a strictly defined legal system and pursuant to arbitrary behavior by the government. So there can be a significant connection between the two. Governments' approaches to commercial law may create standards and expectations that may ultimately affect more generalized aspects of the law, including human rights.



### **Question from audience**

What can the university contribute to the development of ethical business standards, and is this relevant in the real world?

### **Debora Spar**

The university can instill in its students a basic understanding of the wider human interests that they will encounter as managers. What happens when someone leaves the academy and begins to work as a consultant? Well, strange things can happen, though just what depends on the individual doing them.

### **Question from audience**

We can understand the pressures and sanctions exerted by one state against a violator state as a supplement to the often inadequate intergovernmental regimes charged with enforcing human rights, like the UN human rights system. But these bilateral pressures have been very selectively applied, not only with respect to the country but also with respect to the type of violation. The United States, for example, never threatens to cut off economic or military aid to or withdraw MFN treatment from a state seriously violating women's rights, or a state taking no steps to avert widespread starvation.

### **Bryan Hehir**

My argument was that the internationalization of enforcement of human rights is a desirable goal, if necessary through bilateral pressures. The problem in the U.S. is that there is no clear consensus. Consider the kinds of human rights that the U.S. doesn't pressure other states to comply with. It is difficult, for example, even to keep social and economic rights on the domestic table, let alone use their violation elsewhere as occasion for threatening aid cutoffs. In the US domestic health care debate, there was not even a consensus that access to health care constituted a right. If you can't even sustain such a basic social right in your economic policy, it's going to be very difficult to justify it in foreign policy. Multilateral institutions, on the other hand, have standards about which they may think evenhandedly, but they lack the enforcement mechanisms.

### **Debora Spar**

I couldn't agree more. Bilateral pressures are often the most effective measures for promoting human rights, but they require a

commitment by states. It's hard to imagine the United States vigorously supporting the right to food in other countries when we're in the process of cutting school lunches here.

### **Stanley Hoffmann**

Often, human rights are not promoted by states because of the way in which the policy machinery is organized. In the United States, when you place responsibility for human rights in a weak bureau in the State Department, it's almost certain that human rights will be overruled in face of competing governmental or bureaucratic interests. If the powerful government bureaus handle trade, and human rights has less influence, human rights will be given less consideration. It is like your first cooking your omelette and then later deciding if you want salt. The major problem is that the omelette already exists. If human rights is a fifth wheel, it will rarely be an important issue in the making of foreign policy. If such is the case, human rights will only be promoted when there are no competing interests.

### **Bryan Hehir**

If you don't have the office in the State Department, however, it becomes even more difficult to advance human rights concerns. The crucial issue is whether the human rights concerns are considered from the beginning and followed through. When they are considered at the end of the process, the game has already been lost.

### **Question from audience**

As a European, I am interested that you speak of rights rather than duties. What makes this discussion so different in Europe is that we speak of rights in connection with duties.

### **Stanley Hoffmann**

The duty is only the other side of the right. If basic rights of individuals are to be assured, certain obligations would normally need to be imposed on the state toward individuals, the community, the nation and humanity. If we think of the United States, there has been so much emphasis on rights that people have forgotten their obligations. Moreover, duties are often considered to exist or run to others only within the state in which they are being discussed. Most individuals do not have the capacity or inclination to act on an

international scale, to fulfill a duty outside their national boundaries. In the international setting, however, given the pressing realities of repression and oppression, it seems to me that the rights need to be emphasized before the duties that accompany them.

### **Bryan Hehir**

In my religious tradition, we begin with the duties of an individual. Rights then become absolute claims to those goods that are essential to fulfill your duty. For example, if you have a duty to provide for your family, then you have a right to a job, a right to food, and so on. What constitutes us as social beings are our relations to three fundamental communities - our family, civil society, and the human community. Duties exist between and within these relationships.

This argument can downplay the currency and significance of rights in the context of social relationships. That, however, can be dangerous, because rights can be relativized based on the values of the communities where they are being considered. Some societies, for example, assert that individual rights need to be sacrificed for order or other perceived societal goals.

### **Debora Spar**

It must be asked where the rights are coming from. If they are inherently human, then obligations would extend beyond state borders. If they are state-based, then it is difficult to understand how they extend beyond the state. Maybe there are different perspectives in the United States and Europe.

### **Topic III. Population Policies and Human Rights**

**Jonathan Mann** (panel chair)

The topic of population policies and human rights falls naturally within this symposium, given the recent Cairo conference on population issues. There is indeed no better field to explore the forces that go into the formation of human rights policies of international organizations and states.

**Lincoln Chen**

The Cairo conference on population policy in September 1994 moved human rights from the periphery to the center of the population debate. The conference also illustrated the evolving process of international governance in which human rights policies will emanate from civil society led by non-governmental actors focusing on relevant specific issues, rather than depend solely on generic approaches by official governments and inter-governmental organizations like the United Nations.

To give perspective to the emergence of population policy as a human rights issue, I will trace three main themes that have influenced the population field over the past half century and analyze how these themes played out in Cairo. These themes link population policies to socio-economic development, public health, and gender equality.

Population policy has long been viewed as an instrument of socioeconomic development, particularly for poor countries in the South. Reducing rapid rates of population growth, it was believed, would help economic development by reducing consumption burdens (schools, health care, jobs, etc.) and increasing savings and investments. More recently, this instrumental concern has been expressed as part of "sustainable development," shaping demographic change to preserve our environment for future generations.

Over the past half century, population control policies have contributed to the reduction of fertility in many countries. In some of these "population control" efforts, flagrant abuses of human rights have unfortunately been experienced. India in 1977 with its compulsory sterilization drive and China more recently with its one-child policy have implemented policies that fall far short of international human rights standards. More subtle violations may also be prevalent—for example, the use by the government of Bangladesh of incentives or disincentives to shape individual procreative behavior.

What are the human rights or ethical implications when a poor

Bangladeshi woman agrees to sterilization in exchange for a new sari? What are the implications of paying incentives to family planning promoters? Foreign donors providing \$600 million for population control services in Bangladesh want to dictate the terms of these donations, focusing mainly on the provision of contraceptive services rather than meeting the full scope of the people's reproductive health needs. Unfortunately, these types of policies have not and may not translate into a distinguished human rights record for the population field.

It is pertinent to recall that one historical root of population concerns, at least in the United States, has been a field called "eugenics." Eugenicism is about the changing genetic composition of a population due to differential fertility between subgroups. Higher fertility among the poor (either within or among countries) would, over time, skew the generic composition of a population towards the genes of the higher reproducers. An eugeneist might argue that if social or economic achievement is genetically determined and if the successful are under-contributing to the future gene pool, such differential fertility could have negative societal consequences. We have seen the resurgence of this type of thinking with the debate over Charles Murray's book, *The Bell Curve*. Of course, it would be grossly inaccurate to label everyone who supports population control as an "eugeneist," but it would be equally naive to ignore the historical fact that eugenicism has been an explicit as well as a perceived dimension of the population control movement.

The Cairo conference represented a shift from a focus on demographics to the theme of equitable human development, as reflected by the priority accorded to reproductive health, the primary education of girls, and reproductive voluntarism and freedom of choice. The demographics of population control were downplayed, as noted by the conference's final statement that "population stabilization" is universally desired. That statement represents a sophisticated compromise among demographic, development, and human rights concerns.

Those alarmed over rapid population growth were satisfied with the explicit articulation that population stabilization is a desirable goal. Those who advocate human rights saw equitable human development as the ultimate goal of population policies, not as an instrumentality towards population control. Gender equity and the provision of reproductive health services were also viewed as of intrinsic value, not simply a means towards demographic ends.

A second theme of population policy concerns the health of the public. In Cairo, this concern was crystallized by the term "reproductive health," defined by the World Health Organization as

biological, social, and psychological well-being in the human endeavors of sexuality and reproduction.

Public health, especially the health of mothers and children, has been a longstanding concern of the population movement. At Cairo, reproductive health as part of population policies emerged in conjunction with "reproductive rights" and human rights. Good health may be considered as part of the so-called second generation of social, economic, and cultural rights, as it requires the pro-active provision of reproductive health services. Unlike the first generation of civil-political rights, good health requires not simply governmental desistence but the pro-active provision of an "enabling environment," including services like contraception, safety in child-bearing and child health, as well as prevention and treatment of sexually-transmitted diseases, malnutrition, and infection.

Abortion became a major contentious issue at the Cairo conference. The Vatican and some Islamic groups opposed abortion access. However, consensus was achieved regarding the public health importance of preventing and treating "unsafe abortions." Compromise was achieved by stating that under no circumstances may abortion be promoted as a means of contraception and that national laws and cultural norms are to be respected with regard to abortion.

A third theme involved the issue of equal rights for women. It was agreed at the conference that population policies should be consistent with existing international law. Nonetheless the notion of "sexual rights" was dropped because it was considered too contentious. Instead, delegates agreed to the term "reproductive rights."

The meaning of this term, however, continues to be debated. A feminist approach could define reproductive rights as a woman's ability to make decisions without coercion and also to benefit from an enabling environment in which to make sound decisions. Such a definition might go further to include guarantees of bodily integrity, a recognition of the personhood of women as pro-active subjects and agents, a guarantee of equality between men and women as well as among all women, and a recognition of diversity and respect for social, cultural and historical contexts within a framework of universal human rights.

The definition set forth in Cairo differs subtly but importantly from this suggested definition. It acknowledges that certain human rights are now recognized in international law, including the recognition that couples and individuals should be able to decide freely and responsibly the number, spacing and timing of their children, and should have the means to attain a higher standard of sexual and reproductive health. It recognizes the right of all people to make reproductive decisions free from coercion and violence, taking into account the needs of living and future children, as well as responsi-

bilities toward the community.

This definition leaves many unresolved questions. How do we resolve the private and the public distinction? What if there exist differences between a couple versus an individual? What happens in patriarchal societies where there is discrimination, abuse or even torture within a household? What constitutes acting "responsibly" towards the community? How do we take into account the duties toward future children? Who decides what our duties shall be?

As a normative document, the Cairo statement is good for advocacy. But the Cairo Programme of Action is not a legally binding document that can be used to correct for violations of human rights because it has no enforcement mechanism. The Cairo conference, therefore, represents an important milestone in the process of population policy development, not just an event. It can be characterized as an example of "human rights from below," given the large and diverse participation in the conference. Cairo's grassroots approach can be contrasted with "human rights from above," which focuses on the role of governments and the United Nations in making human rights policy.

Human rights from above is essential but insufficient for the advancement of population policies consistent with human rights. Human rights as statecraft faces geopolitical biases. Such problems were illustrated in the Islamic debate at Cairo. Extremist Islamic groups attacked Cairo's population policy statement as part of their ideological power struggle with the West and also with their own secular governments, many of which had failed to deliver equitable development—Egypt for example. Thus, the population debate reflected an internal struggle between Islamic and secular forces, playing out a "population card," as much as it expressed a struggle among different cultures or transnational human rights issues.

Cairo represented human rights from below, with an enhanced role for NGOs and civil society. The conference participation included reportedly 1,500 NGOs, many of which were women's groups. Among the NGOs, women's groups were by far the best organized and had a powerful impact on the Cairo process and outcome. Some groups spent two years preparing for the conference, including participation in the 1993 Vienna World Conference on Human Rights. In 1993, a statement of ethical principles was prepared by the women's community. In 1994, women from around the world met in Rio de Janeiro to close the North-South gap, so that the women's caucus at Cairo would be united. Although the women's groups followed a clear strategy to focus on the official government document, they also directed much attention to the media and world public opinion.

Cairo thus may be an illustration of the future processes in

global governance—the confluence of forces from above, such as governments and the United Nations, joined by forces from below, such as the NGO community and social movements. It is the interaction between these forces that will continue the debate about population policies, a debate in which human rights will increasingly play a critical unifying role for the entire world community.

### **Carla Makhoul Obermeyer**

Human rights has become an instrument to shape international relations. This phenomenon has lent urgency to the search for a definition of human rights that has universal applicability without imposing notions particular to the West on the developing world. In this quest we must avoid both homogeneous universalism and paralyzing relativism. Our challenge is to seek instead common ground between different cultural traditions.

Although the potential for convergence between different cultures is considerable, the task of realizing this potential is complicated. It requires comparative analysis, knowledge about several disciplinary domains, and careful research. Without serious efforts in this direction, future international encounters will either deteriorate into fruitless disputes or else merely restate the obvious by focusing on the least common denominator among different traditions. I would like to illustrate the difficulty and rewards of this scholarly process by drawing on current work in the Middle East on the question of reproductive rights.

The Cairo conference on population in September 1994 shifted discussion of population policies away from societal imperatives toward individual reproductive needs seen in a holistic fashion, including health as an essential element. This reformulation raised the question: what would reproductive rights, defined as the right of individuals to decide freely and responsibly about the number and spacing of their children, mean in the predominately Muslim cultures of the Middle East? When I started to explore this question, it was obvious that the territory was fraught with danger. Because reproductive rights are dependent on individuals' abilities to exercise basic human rights, an understanding of reproductive rights requires that we consider the status of women in Muslim society. This is a topic that arouses both great interest and intense passion.

The status of women continues to be a major area of confrontation between Islam and the West. Moreover, the discourse about women and their rights has often been dominated by the most uncompromising views on both sides. To those who are convinced that the post-cold war clashes are to take place along the divide



between Islam and the West, the differences concerning women's status appear to set Muslim societies apart from the rest of the world and to support a diagnosis of incompatibility between the two cultural traditions.

Powerful images on both sides reinforce these perceptions. Poor health and fertility indicators in many Muslim countries, for instance, are readily attributed to Islam and the way it defines the status of women. This attribution is rarely subjected to criticism because it fits with images that people have about women in the Middle East. Indeed, in much of the Western literature and media, both scientific and popular, selective exotic aspects of Muslim countries are emphasized, such as harems, veils and aphrodisiacs, or emphasis is put on brutally oppressive practices such as child marriage or female circumcision. Yet these customs are unknown in most societies in the region. Nonetheless, many Westerners feel that Islam is incompatible with their notions of human rights, equality and freedom of choice.

At the same time, many Muslims feel ambivalence toward values that developed in the Western tradition. As a result of stereotyping in the media and lack of information, Western traditions are characterized in the popular mind by the breakdown of the family and an epidemic of unwed teenage pregnancy, sexual promiscuity, alcohol and drug abuse. These images generate anxiety about Western human rights values, as people come to associate gender equality with normative confusion and social disorder. As much as they agree with principles of equality and freedom of choice, many people in the Middle East feel the West does not provide an attractive alternative to existing conditions. Instead, many people cling to tradition as the best protection against chaos.

Polarization becomes more powerful in the context of North-South tensions, which have been expressed at various international conferences dealing with development, population and human rights. In addition, philosophical elaborations on each side are dominated by the establishment and suggest that each tradition starts from fundamentally different principles—for example, "reason versus regulation" or "rights versus duties." Such distinctions reinforce the notion that these differences are immutable.

Moreover, differences are noted more readily than similarities. But if we work with the conviction that commonalities can be found beyond what seems to separate us, we become mindful of variations within each of these apparently incompatible and monolithic sides. It is not a matter of stretching Islam so that it fits with Western notions of human rights and reproductive choice, or a matter of redefining human rights in a way that will not offend the Muslim establishment. Rather, each side needs to take a step in the direction

of the other. One has to acknowledge the important fact that complete equality is nowhere a reality, even in those societies that hold it as an ideal. This recognition entails a degree of modesty toward other formulations and a certain openness to those cultures that emphasize complementarity rather than complete equality between the sexes.

One perspective, which has been muted in both the Western and Muslim traditions, is attentive to women's views and voices. Listening to their voices can help define a new approach to these issues of reproductive choice. The Western tradition, for example, is increasingly challenged as unequal, male-dominated and tied to an ideology of the marketplace. Western feminists have questioned classical liberal thought and standard formulations of human rights, which often do not acknowledge the inherent bias of the law or women's specific experiences. As an alternative, Western feminists have offered reformulations of the ideas of equality and autonomy that are more consistent with women's experience of reproduction and patterns of care-giving. In so doing, they have taken a step toward other cultural elaborations of gender that emphasize rather than ignore differences.

In the Islamic tradition, we should distinguish between what is "Muslim"—that is, the practices of Muslims—and what is "Islamic" or an essential feature of the religion. This distinction is useful because it separates the ideal of the religion from its implementation by various sects. It acknowledges diversity while protecting the central core of the religion against totalitarian camps.

Historically, the dominant tradition of Islam has tended to be inegalitarian with respect to gender issues, despite the fact that the Koran contains many statements about the equality of all believers before God. Muslim feminists believe that those statements in the scriptures that recognize women's equality are the authentic message of Islam, while other statements suggesting discrimination are merely reflections of the temporal conditions in which the religion evolved. They point out that the Koranic statements about preference given to men are ambiguous, while Islam has explicitly acknowledged a woman's right to own and manage property.

Another element of the Koran that often is overlooked is the emphasis on mutual consent rather than coercion as the basis for relations between men and women. Religious texts explicitly state that spouses should agree concerning the practice of breast feeding and that a man must obtain a wife's consent before practicing withdrawal, because this may interfere with her enjoyment of sex or her desire for children. This emphasis on mutual consent, explicitly stated in the scriptures, can be extended to other areas of life. Feminists have argued for an approach to marriage involving

agreement rather than compulsion. They oppose the asymmetrical view of marriage which has been historically been prevalent in the Middle East.

Women in several parts of the Muslim world have been working within the framework of Sharia Islamic law with the aim of realizing egalitarian laws. For instance, female scholars in post-revolutionary Iran have stressed the idea that the husband has no legal rights to his wife's labor or property. They have argued that in case of divorce, the man must compensate his wife for the labor that she has contributed to the management of the household. Such legislation has contributed to raising the cost of divorce for men and called into question the asymmetry in the husband-wife relationship by recognizing the woman's contribution and giving it concrete value. Similarly, there are efforts by Muslim feminists and legal scholars in several countries to develop a more egalitarian marriage contract. The hope is that the use of such a contract would gradually change societal norms toward more egalitarian definitions of gender relations.

In sum, the existence of egalitarian elements in the scriptures, the ambiguity of the texts and the efforts of reformists all contribute to a remarkably dynamic situation for understanding reproductive rights. And yet, if we remain at the level of superficial comparison between Islam and the Western tradition, we would have been led to believe that these were two completely incompatible systems. By combining analysis of doctrinal, ethical, legal and social dimensions of gender, we discover a great potential for convergence.

Further probing into the way in which individuals negotiate and prioritize their rights may provide ways for thinking about new definitions of essential rights. To articulate them, we must move beyond a general legal and normative level of analysis and instead attempt to understand reproductive rights in their particular contexts. How men and women perceive reproductive rights, and to what extent their decisions and behaviors reflect concern over such rights, are questions that require multi-disciplinary research and only now are beginning to be addressed. Only when we can comprehend local notions of rights can we begin the two-way process of translation and develop culturally relevant notions of rights.

### **Amartya Sen**

This symposium is not only about the importance of human rights, but also about the need for academic study and critical investigation of the role and function of human rights in the contemporary world. Is there any need to "study" human rights? Isn't it largely a matter of quiet conviction—one way or the other—rather

than being a fit subject for courses and syllabuses and examinations and grading? Not everything that is important in the practical world need be put into a college curriculum. I shall try to address these doubts, along with discussing the importance of human rights generally, and their relevance for population policy in particular.

We could begin by asking why rights are important? Not everyone—among those who have spent time thinking about these issues—agrees that they are important. The great Jeremy Bentham, the founder of the modern form of utilitarianism, thought that rights were redundant for the foundation of ethics. Indeed, he thought the idea of natural “rights” was nonsense, and the concept of “natural and imprescriptible rights” was “nonsense on stilts”—nonsense that was artificially elevated by props. We have to ask whether Bentham was right in taking this view, but even more immediately we have to ask why, since he held these views, he spent so much of his life exploring and extending the legal structure of rights. (Bentham’s analysis of different types of rights still remains a legal classic.)

There is, in fact, no contradiction in Bentham’s position. He thought that it is extremely important to have a good legal system with well-defined rights. What he was disputing is the belief that rights can have *fundamental* as opposed to *derivative* and *instrumental* importance—convictions that were eloquently expressed in the writings of some of his contemporaries (for example, in Tom Paine’s *Rights of Man*, or in Mary Wollstonecraft’s *The Vindication of the Rights of Women*, both published in 1792, right around the time that Bentham was producing his great utilitarian works). To Bentham, rights were legal entities, and in the ethical context, he saw them as no more than instruments—possibly useful, possibly harmful—to the real objectives. The objective he favored is the maximization of the sum-total of happiness. But precisely because Bentham took that instrumental view of rights, it was extremely important for him to study the structure and operation of rights: How are they formulated? How do they work? What effects do they have? And how can they be reformed and improved to better serve the promotion of “the greatest happiness of the greatest number”?

Bentham’s dual position on rights—skeptical of its foundational claims and yet strongly supportive of the case for studying them—has important lessons for understanding the place of human rights in a university’s teaching and research activities. Despite the fact that Bentham took an instrumental rather than foundational view of rights, it was necessary for him to devote time and energy to studying how rights actually function—and what they do (or do not) manage to achieve.

In our world today, the same questions remain. Even if we attach

no basic importance to rights and see them in purely instrumental terms, we still have to examine how well they function as instruments. If human rights are asserted and respected, would it lead to a happier society? Underlying that basic utilitarian question are more specific inquiries. How do human rights affect economic progress? What truth is there in the often-articulated belief that rights hinder economic development and growth? How do human rights influence social equity and prevention of social disasters? And—specifically in the context of this session—how do the assertion and protection of reproductive rights of families in general and women in particular influence the birth rate and population growth? What wisdom is there in the fear that “free for all” in reproduction would generate an intolerably large number of people?

While there are good grounds for studying rights even if—following Bentham—no intrinsic importance is to be attached to rights, the richness of the field is substantially enhanced by admitting the possibility that rights may also be intrinsically and fundamentally important. Powerful arguments in that direction have been developed by many contemporary philosophers, led by John Rawls, but also by Robert Nozick, Ronald Dworkin, and others. Along with the intrinsic importance of rights, we now understand better the crucial role of elementary rights in making a modern, pluralist society possible, and we can also see more clearly the connection of social justice with the upholding of basic rights.

### *Rights, Economic Development and Social Disasters*

There is a much-repeated belief that political rights correlate negatively with economic growth. Something of a “general theory” of this has been articulated by that unlikely theorist, ex-Prime Minister Lee Kuan Yew of Singapore. Certainly, some relatively authoritarian states (such as South Korea, Lee’s own Singapore, and recently China) have had faster rates of economic growth than some less authoritarian ones (such as India, Costa Rica, or Jamaica). But the overall picture is much more complex than these isolated observations might initially suggest, and systematic statistical studies give little support to the view of a general conflict between political rights and economic performance. No clear relationship is found in either direction.

We should not take the high economic growth of South Korea or Singapore as definitive proof that authoritarianism works beautifully well in promoting economic growth—any more than we should interpret the fact that the fastest growing African state (viz. Botswana) has been a oasis of democracy in that continent as conclusive proof that a democracy is an excellent means for achieving economic growth. Generalization from a few observations when masses of

other empirical information exist is not very good science. And when the available data are looked at more comprehensively, we don't get any clear relation one way or the other. On that basis it would be reasonable to conclude that if democracy and human rights are themselves valuable (as we can readily believe they are), then we can enjoy that value without compromising the prospects of economic growth.

There is also a need to study, as I have tried to argue elsewhere, the connection between political and human rights, on the one hand, and the prevention of major social disasters, on the other. Rights not only give people the freedom to do things for themselves, they can also provide the opportunity to draw political attention to the more acute needs of the people (and through that to influence public action in the appropriate direction). Whether and how a government responds to needs and sufferings may well depend on how much pressure is put on it, and the exercise of political rights (such as voting, criticizing, protesting, and so on) can make a real difference.

For example, one of the remarkable facts in the terrible history of famines in the world is that no substantial famine has ever occurred in any country with a democratic form of government and a relatively free press. This applies not only to the countries that are rather rich, but also to democratic countries that happen to be very poor, such as India, Botswana, or Zimbabwe. There is also intertemporal evidence in the same direction when a country undergoes *transition* to democracy. For example, India continued to have famines right up to the time of independence in 1947 (the last large famine was in 1943 with 2 to 3 million deaths), and then it stopped quite abruptly with independence and the installation of a multi-party democratic system. No government can afford to face elections after a major social calamity and expect to get reelected, and the incentive effects of this connection can be very powerful.

### *Population Problems and Reproductive Rights*

The preceding argument applies to political and civil rights. But what about reproductive rights? Those rights do not, of course, have any direct role in promoting appropriate public action. In fact, on the other side, there has been much articulation—directly or indirectly—of the general presumption that giving a free rein to reproductive rights must be conducive to a population explosion in the third world.

It appears, however, that the birth rate does definitely tend come down sharply with the spread of education and development (which give people more ability and reasoned opportunity to decide on births and the size of the family), with the fall of mortality rates

(which reduces the need to have many children to make sure that some survive), and with the development of life styles that value and make good use of substantive freedom (particularly of women to pursue careers and economic and social opportunities). Wherever education has spread (especially female education), mortality rates have fallen, and wherever job opportunities for women have expanded, fertility rates have sharply declined too. For example, in South Korea, Thailand, Sri Lanka, China, or the Indian state of Kerala, the fertility rate is similar to or lower than that in the USA.

Of these experiences of a fall in fertility rates, the only one with the force of compulsion behind it is China, and China's success in forceful family planning is often quoted. Coercive methods (such as the "one child policy" in some regions) have received sustained trial in China since the reforms of 1979. Many commentators have drawn attention to the fact that the Chinese birth rate has fallen sharply. It has come down to 19 per thousand by 1992, compared with 29 per thousand in India, and 37 per thousand for the average of poor countries other than China and India.

The difficulties with this approach arise at different levels. First, the restriction on the family's autonomy in some very personal matters (viz. on how many children to have) is itself a significant loss of freedom, and can plausibly be seen to be something of a social loss in itself. This basic aspect of the problem is often dismissed on the grounds that cultural differences between Asia and the West make such authoritarian policies acceptable in Asia in a way they would not be in the West. Cultural difference is a hard territory, and while it is easy enough to refer to "despotic Oriental traditions", that line of reasoning would be no more convincing than basing judgements on what to do in the Western societies today on the traditions of Spanish inquisitions, or of the Nazi concentration camps. I recognize that Confucius can be given rather authoritarian interpretations, but he is not the only classical author in Asia—not even in China. Also, I do not detect more authoritarianism in Confucius than when I read, say, Plato or St. Augustine.

Second, in so far as coercion achieves some results, it works by making people do things they would not freely choose to do. In China the draconian restrictions on reproductive rights have contributed to the continued high infant mortality, especially for girls.

Third, it is also not clear how much "extra lowering" of fertility rates has been achieved in China through compulsion, compared with what could have been expected otherwise. We must bear in mind the fact that aside from compulsion, China has also done many positive and supportive things that help to reduce the fertility rate, such as expansion of basic education and of jobs for women. These factors too would have reduced the fertility rate in China, and we

must not attribute all the reduction of fertility in China to compulsion and violation of individual rights. While China seems often to receive uncritical praise for its authoritarian measures, it gets far too little credit for other - supportive - policies it has followed that have helped to cut down the birth rate.

The contrast with India is also instructive here. While most states in India are far behind the Chinese provinces in educational development (with the exception of Tibet, which incidentally has the lowest literacy rate of any Chinese or Indian state), the state of Kerala in India provides an interesting comparison with China, since it too enjoys high levels of basic education, health care, and so on, even though its income per head is quite low (in fact, lower than even the Indian average). Kerala's birth rate of 18 per thousand is actually lower than China's 19, and this has been achieved without any compulsion by the state. Kerala's total fertility rate, reflecting the number of children born per woman, is 1.8 compared with China's 2.0.

Kerala has a female literacy rate substantially higher than China's (86 per cent in Kerala vis-a-vis China's 62). The rural literacy rate is in fact higher in Kerala than for every individual province in China. There are other social influences, including property laws that favour women for a significant section of the population of Kerala, and a long tradition of political activism, which has increasingly included public discussion on women's rights (including the need to have smaller families). Since this process has been collaborative, rather than coercive, there are none of the adverse reactions, such as high female infant mortality observed in China, and Kerala's consensual route to low fertility has been achieved along with an infant mortality rate of 17 per thousand for boys and 16 for girls, compared with China's 28 for boys and 33 for girls.

In this collaborative achievement, women's agency has played a major part, through open discussion and reasoned persuasion, and the reduction in birth rate has gone hand in hand with the fostering of gender equality. With a history of gender bias in Asia and North Africa, women tend to be outnumbered by men, because of the historically higher mortality rates, related to lower attention and care that they—girls in particular—receive. Quite often in these countries the female-male ratio is well below one (unlike in Europe and the West where it is significantly higher than unity). However, the ratio of females to males in the total population in Kerala (about 1.04) is rather similar to what obtains in Europe and America, compared with the Chinese ratio of 0.94, and the average ratio for India of 0.93. There is a big difference between the reduction of fertility rate through compulsion by the government, and that in a social atmosphere in which women's rights and interests are re-



spected and where women have a good deal of decision making power.

The Chinese attempt at fertility reduction is, thus, not only problematic in terms of the violation of freedom, and terrible in terms of generating consequences that are particularly adverse for women, it has been no more effective than procedures tried elsewhere that have involved collaborative processes rather than coercion. In fact, in 1979 when the one-child policy was introduced in China, its fertility rate was 2.8, compared with 3.0 in Kerala. By 1991, China's fertility rate had fallen from 2.8 to 2.0, but in the same period Kerala's rate fell from 3.0 to 1.8, without any compulsion whatever.

China certainly deserves credit for its achievements, but the fertility decline has not been as unique it is sometimes claimed. Many countries have been experiencing sharp falls in fertility rate in recent decades, including South Korea and Thailand, in addition to Kerala, and in all of them, supportive social changes such as the expansion of female education and of women's right and opportunity to work outside the home seem to have contributed greatly.

#### *A Last Remark*

The constitutive importance of basic rights includes the role of free and public discussion in the formation of needs. The fact that in contemporary Kerala, having a smaller family is now seen as a "basic need" of a modern couple - of women in particular but of men too - is associated with the exercise of rights of political and civil freedom (particularly to have free public debates, exchanges and arguments). Open public discussion has, thus, influenced reasoned use of the right of reproductive freedom.

Public discussion is quite central to the perception of "needs", influenced by the awareness of—and deliberations on—what happens in other countries, making clear what real possibilities the contemporary world offers. The process of fertility reduction has been, in this way, closely linked with the rights of public debates and dialogues. Recognition and scrutiny of this interconnected process can be very important indeed. There is much to study here—much to learn from.

# *Questions and Comments*

## **Question from audience**

Can you comment on Sharia law with regard to reproductive rights?

## **Carla Makhoul Obermeyer**

When it comes to reproductive rights, as such, there is very little in the sacred text of Sharia law that has a direct bearing. We find some comments about gender equality and inequality. There are some statements in the Hadith, or sayings of the prophet, that family planning is acceptable. For example, at the time, the companions of the prophet asked if it was permitted to use withdrawal while they were away at war and he said fine. This, by analogy, is taken to acquiesce to other methods of non-terminal family planning. When it comes to the issues of abortion and sterilization, these are terminal methods of family planning and a number of schools of law have argued that they are contrary to the spirit of the law.

## **Question from audience**

Professor Sen spoke about the success Kerala enjoys in obtaining democracy and human rights. But what success would there be in the effort to apply all this to the rest of India?

## **Amartya Sen**

The reason Kerala is interesting is that it had the dual presence of democracy and a high level of education expansion and gender equity. There is no other Indian state that compares with it, although some come close. India's fertility rate is 3.6 as compared with 1.8 in Kerala. There is a kind of gradation among the states. The ones that are doing badly are those which are not providing women with greater education and opportunities. Even now, some Indian states in the north refuse to give health services to non-sterilized women, and their fertility rates are high. So if you look for comparisons within India, you come to the view that compulsion does very little good.

## **Lincoln Chen**

I want to endorse the point about the importance of female health and education for fertility. From the mid-1960s, there has been a dramatic fertility decline in the Punjab accompanying that region's social achievements in health and education. However, we should not relate fertility change exclusively to such achievements. Recent analysis shows that fertility decline in the Punjab began in the late 1940s and early 1950s, before women's education improved. Hence we have to turn to other dimensions, including equitable property distribution, land ownership, and land management planning among families. More traditional methods of family planning were used, such as delay of marriage.

## **Topic IV. Discrimination: Comparisons Among Gender, Race and Sexual Orientation**

**Henry Steiner** (panel chair)

This panel explores relationships among three types of discrimination. It tries to figure out why anti-discrimination measures followed a certain chronology both in this country and in the international human rights movement: first, prohibition of racial discrimination, then of gender discrimination, while today the debate rages about what measures to take, indeed whether to take measures, against discrimination on the basis of sexual orientation.

As far as the international movement is concerned, racism was considered an evil from the very start. It became a primary focus of attention, a fuel for the entire movement, often as part of the campaign against apartheid and colonialism. Gender discrimination was also barred in the fundamental human rights instrument, the Universal Declaration of Human Rights, but that prohibition had to wait decades longer to become a focus of attention and to be incorporated into the mainstream discussion of human rights. A normative consensus started to develop much later. Today that consensus holds on certain core issues like nondiscriminatory hiring, while on other issues dispute continues in political fora and within the women's movement. As yet we see no consensus on the national or international level regarding the rights of sexual minorities to equal protection, or on what are the implications of equal protection.

Why this sequence? Is it significant, or merely an accident of history? Do the feared consequences of ending discrimination differ radically among these three fields? Is there some implicit hierarchy, some forms of discrimination being considered worse than others? What explanations can we offer? Such are the questions before our panelists.

### **Randall Kennedy**

Presently there clearly exists a hierarchy of human rights under which invidious race discrimination is more widely acknowledged as evil and more harshly condemned than invidious gender and sexual-orientation discrimination. This is surely true in terms of the formal articulation of human rights in the most influential international fora. Virtually all states are parties to the International Convention on the Elimination of all Forms of Racial Discrimination. Many but fewer states ratified the Convention on the Elimination of All Forms of Discrimination Against Women. There exists no such

convention with respect to sexual orientation. This hierarchy is well established in the United States as well, including academia. To be seriously labelled a racist is worse than to be seriously labelled sexist, which is worse than to be seriously labelled anti-gay or anti-lesbian.

What accounts for this ordering? Although there are probably many reasons, three appear particularly salient. First, this hierarchy came about partly through the examples of Nazism and apartheid, negative examples producing such revulsion that they tremendously encouraged the international stigmatization of racial discrimination.

A second reason has to do with decolonization. Many actors in the international arena, particularly in the states of colored populations that were liberated from colonial regimes after World War II, waged their battle for self-determination partly by attacking racism. While men of color were strategically positioned after the war to establish the formal norms of the post-war, post-colonial human rights order, women and uncloseted gay people were largely absent from the higher circles of influence.

Third, many people believe that racial discrimination is the least justifiable of the forms of discrimination under discussion. This is so, at least in part, because of a popular intuition that racial difference is relatively superficial, that societies will not fall apart or need to be fundamentally restructured in order to free themselves of racial subordination. By contrast, there exists a widely felt and deeply held intuition among women as well as men that women and men are fundamentally and not merely superficially different, and that this sense of difference is not a misperception based on myth or social construction but a perception of reality based on observable differences, the most dramatic of which has to do with procreation. A society which truly recognizes gender equality may well have to be radically restructured.

With respect to gays and lesbians, the intuition is that such people are fundamentally different because of their conduct. For such reasons, assuring women and gays and lesbians of non-discrimination will require more fundamental changes in society than assuring different racial groups of equal treatment.

### **Martha Minow**

Why did the international human rights community rank different types of discrimination and therefore declare rights against racial oppression first, gender next, and sexual orientation—not yet? Why does it seem plausible to rank the evils of oppression along these three dimensions?

These questions prompt another: what do these categories have in common? From the vantage point of members of oppressed groups, the categories seem bizarre. All people are members of many groups, and everyone has a race, a gender, and a sexual orientation. There is a danger of engaging in an oppression Olympics. The real question is why have responses to various forms of oppression taken different historical pathways.

The three forms of discrimination are not the same. Racial discrimination has always treated an external sign about a person as a proper determinant of her fate. This was challenged by enlightenment thought rejecting the idea of status created through inheritance. Individual rights in this tradition paradigmatically took the form of negative liberties against state violence, appropriation, or intrusion. Basic procedural and substantive protection of the civil and political kind formed the core. In this context, the movement for human rights forbidding race discrimination could, and did, seek inclusion of all persons, regardless of race, in this scheme of civil and political rights. Desegregation of schools and places of public accommodation, for example, fit comfortably into this enlightenment mode of thought as an issue of individual rights.

Gender issues differ. They rest on a crucial distinction between the public and private realms. Most of the international human rights seem to benefit the individual against the state, not against others in the private sphere. That private sphere centrally involves the realms of family, home, and, in secular liberal regimes, religion. However one describes the circumstances framed by gender, it would be difficult to exclude this private realm. Yet civil and political rights usually exclude family and home from scrutiny.

Religious and cultural authorities historically justified the different societal roles of men and women. Although the promotion by liberals of the civil and political rights of women might get women the right to vote, such a victory will have meaning only if women can fully express that right. It will have no or little meaning if the position of women in society and the family means that their voice will be muffled or their vote controlled.

What resources have traditional human rights notions offered to challenge the practice of female genital mutilation, sanctioned and approved by families and religious authorities, or to deal with marital rape and wife battery? Efforts by women's rights advocates have run directly into conventional definitions of public and private.

The norms of the Convention to Eliminate All Forms of Racial Discrimination Against Women (CEDAW) dramatically recognize such types of problems and depart from traditional views of civil and political rights. This treaty charges its states parties to eliminate

gender stereotypes. Numerous member states, however, signed with reservations precisely on issues such as conflicts between the Convention and religious teachings or domestic family law.

It remains as likely as before that many issues concerning women will be more directly addressed through human rights notions of public health, efforts to define torture to include violence against women, and through social and economic rights. Being able to say “no” to genital mutilation for you or your daughter is inextricably tied up with the availability of social and economic options for a woman other than marriage within conventional traditions. Being free to leave a battering husband crucially depends on a woman’s ability to support herself economically—and not to lose custody of her children in the process. All of this is to say that a lot of social transformation will be required before the promise of ending gender discrimination is realized.

Sexual orientation also shows the limitation of the older paradigm of civil and political rights—where human rights started but over the decades have moved far beyond. It centrally involves the construction of the self in both public and private spheres, because it involves the expression of desire. Reformation of family law—regarding marriage, adoption, partnership, inheritance, new reproductive technologies—is central to a conception of freedom from oppression based on sexual orientation, as is resistance to religious authority. Unlike the prohibition of racial discrimination, it requires innovations going beyond the older conceptions of rights.

Let me briefly suggest ways in which the comparison among race, gender, and sexual orientation wrongly excludes other potentially relevant categories or groups. The rights of children, people with disabilities, and victims of extreme poverty have all been paid less attention than the right of members of all races to equal protection. The unevenness of consideration of the various forms of discrimination brings into question the traditional rights approach that people who are similarly situated should be treated the same. The same, I would ask, as who?

To ask about different categories of oppression ultimately is to ask, what then should be the point of departure for the consideration of human rights? Is the able-bodied, straight white man the starting point and standard of human rights? Or can the points of departure include all human beings? Perhaps we could learn about how we moved from a long-standing conception that race signified something real that law should affirm rather than deny. Indeed, the idea that race is a matter only of superficial skin color is a modern view. People used to think of race differences as akin to differences between species. Will people wonder in 100 years whether what we now consider differences, such as those in sexual orientation, are

meaningful differences at all?

It is not really difference that oppressors fear so much as similarity. Human rights reminds us to focus on our shared humanity, our mutual vulnerability and responsibility. I suggest that we break out of the idea that there is one paradigm for discrimination, one paradigm for oppression, one starting point for comparing treatment of different groups. Eleanor Roosevelt reminds us that we will all die together or live together. To live together, we must talk in order to alter patterns of pain and death.

### **Peter Gomes**

All agree that in the hierarchy of discrimination, discrimination based on sexual orientation is at the bottom of the heap. In the sweepstakes, race is first, gender second.

Professor Kennedy has put the question wisely in asking why these hierarchies take the shape they do. Sexual orientation as an object of discrimination is the last universally acceptable prejudice. In the other settings, there is a stigma on publicly expressing naked prejudice.

It was once the same with regard to race and now such expressions are no longer acceptable. With regard to women, perceptions have changed as well, particularly in the last quarter century. For both, there is a movement towards greater tolerance and acceptance. No such movement is taking place with regard to sexual orientation.

This is something of a paradox. Homosexuality is politically invisible yet socially chic. Gay cultural icons are everywhere in our society. It is acceptable to participate in AIDS benefits, appreciate the homosexual role in the theater, and study homosexuality in the university. Yet this contrasts sharply with the absence of sexual orientation in the human rights hierarchy.

I want to suggest that this last acceptable prejudice continues for several reasons. One is that sexual orientation, defined in terms of civil rights, is the least easy of the three to quantify or address in terms of a public consensus. Most movements have a clear agenda around which a consensus must be formed. There must be an egregious attack to that budding consensus against which a response can be best formulated. With regard to race, there was a wide variety of opinion in the past, but once the horrors of Nazism and the threat it posed became clear, a consensus was formed. It is therefore no accident that the human rights movement formulated itself in the wake of World War II.

The women's movement in its various forms has had profound social and political effects on every institution in this country and on many abroad. With regard to sexual orientation, however, no con-



sensus has yet formed. This is in part because it deals with an issue so intimate that people are uncomfortable discussing it.

Also, accepting the right of another to consent to a homosexual act would force us to reconsider the issue of whether that other is so profoundly different from the perceived norm. This reconsideration might lead to fundamental change. The risk of recognizing the rights of others such as homosexuals addresses the fear that the other is not so different from ourselves. Homosexuality is an invented term, invented in the nineteenth century. Homophobia, the fear and loathing of homosexuals, is also a new word. Both are word games built around created notions of acceptable forms of sexuality.

This prejudice continues in American culture because there is no palpable sense by the majority of the existence of such discrimination, as there was with race and gender. Using the rights paradigm for homosexuality, homosexuals who are visible seem to be prospering. There is not the same sense of a class discriminated against. There appears to be no aggrieved class. Where the aggrieved class then manifests itself, its grievances are expressed in normative grounds, whether cultural, moral, or religious. It is not religions which create norms, but they rather reflect the norms of a given time. Both norms and religions are subject to cultural revision and progressive revelation: they follow rather than lead the consensus.

My sense is that the hierarchical arrangement is clear and unambiguous. There is a tremendous amount of work that needs to be done until the last acceptable prejudice is acceptable no longer.

## *Questions and Comments*

### **Randall Kennedy**

Professor Minow, near the end of your talk, you sounded skeptical about the utility of rights rhetoric in your discussion of the sameness/difference dilemma. But how can we universalize human rights without standards? If we're seeking to change the world, it's surely important to take complexities into account. But don't practicalities require standards around which efforts can be focused?

### **Martha Minow**

We may need simplicity for a mass movement, but not necessarily for conceptions of human rights. We can insist on universality in human rights without limiting ourselves to the equality question: who should be treated the same as the "norm"? I don't think that

we've exhausted the possibilities of advancing human rights through the equality framework. Yet equality is only one aspect of rights, particularly its commitment to treat likes alike. There are other ways of formulating rights. There are other rights paradigms which can be universalized - how about, for example, the right to bread. It could be universal without looking to characteristics of the person.

I would like to ask the panel what is the ideal of a world without the three discriminations. Should people be able to choose what race, gender and sexuality they or their children will have? These changes could soon be made through technology and bio-engineering. Is homosexual behavior genetic or is choosing sexual orientation a matter of free choice? Is absolute freedom of choice what we are looking for? It chills me to think so.

### **Peter Gomes**

I'm not yet ready to deal with the eugenics question, but I do want to address one of the principal issues among homosexual activists—that of discrimination and exclusion. Homosexual activists often ask that they not be discriminated against on the basis of sexual activity. They wish to be involved on the same level as others in the political discourse. "Let us in and leave us alone," would be a slogan for sexual orientation rights.

### **Martha Minow**

The reason that the specter of altering our children's identities—with respect, say, to homosexuality—is so frightening is that it would only perpetuate the prejudices that led us to choose the safe path through alteration. The best way to deal with that scenario is to tackle those prejudices.

### **Question from audience**

There are invidious forms of injustice to the homosexual community that reach to the core of our conceptions of self and family. Is the attack on affirmative action similarly a threat to human rights discourse that reaches through the code of race to gender and other differences?

### **Peter Gomes**

It is possible both to have one's own questions about affirmative action and also to recognize that the attack upon it is a Trojan horse

used to attack other issues about which people want to speak but dare not speak. Race will always be a fault line in American society. The debate about affirmative action is an attempt to turn back the clock and return America to an earlier state of affairs.

We are in a period not unlike that at the end of radical reconstruction. The South was left to cope with the mess that the war had produced. Within twenty years of the Emancipation Proclamation, new systems had evolved that were as bad as or worse than slavery. Tremendous forces of reaction will always fight to revert change.

### **Randall Kennedy**

The Convention on the Elimination of All Forms of Racial Discrimination asserts that special measures for the advancement of certain racial or ethnic groups shall not be deemed racial discrimination provided that they do not lead to the maintenance of separate rights for special legal groups and that they do not last longer than required. Certainly, there are some people who are attacking affirmative action because they oppose the advancement of women and people of color. On the other hand, affirmative action threatens to become a permanent feature of our society that entrenches difference. We need to differentiate the evil intentioned attacks on affirmative action from other forms of criticism.

I would disagree with Rev. Gomes that race will always be a fault line in American society. De Toqueville made a similar argument. I put myself in another tradition, that voiced by Wendell Phillips and Frederick Douglas. Douglas said he saw the future of a country where equality would prevail regardless of race. I agree with Martin Luther King that "We shall overcome." I believe that our very conception of race will be subverted and transformed—to be succeeded, however, by new problems to overcome.

### **Peter Gomes**

It has here again been demonstrated that lawyers are far more optimistic than clergy.

### **Martha Minow**

In a recent decision, a judge rejected a consent decree because the remedy was not strong enough; a past history, said the judge, requires continuing change and we can't close the books on it. It actually was an antitrust case; corrective justice commonly requires a commitment to overcome the legacy of the past. People are tired of

affirmative action, but the problems of racism still exist. Society has to want to change for affirmative action to work. The change is not once and for all. The goal of certainty and closure is elusive and that's frightening.

If I can confound the conclusion further, race itself is a recent concept. In societies where race didn't matter, other categories mattered. Even if race is on its way out, the question is what comes next. This issue makes the affirmative action question so difficult. Affirmative action should not simply replace one group on top with another. That perpetuates the story of domination.

### **Question from audience**

Clearly, some forms of discrimination are desirable while other forms are not. The societal issue is what forms of discrimination should be discouraged. Should you discriminate about the things that people can control as compared to things that are not within their control? Would that be a possible fault line?

### **Question from Stanley Hoffmann**

I'm afraid that even if some day the three discriminations discussed today have been resolved, there will still be the same prejudice against foreigners. I'm surprised that there has here been so little attention to population movements, immigration, asylees and refugees. What I notice is a wave of xenophobia coming that feeds on racism and other forms of discrimination but can live perfectly well without them. I want to remind you that the three discriminations discussed in his panel are not the major issues even if they are the ones that concern the Americans most.

### **Martha Minow**

The control issue signalled in the question from the audience is an appealing ground for distinction, but it fails because the line of control/non-control shifts over time. Additionally, the moral intuition behind it is problematic. The issue of religious conversion comes to mind. It is dangerous to accept that if you can alter something, you do not deserve protection for what you are or believe or have come to believe.

As for Stanley Hoffmann's question, the presence of foreigners always raises contentious issues. The symbolic figure of the foreigner as the force unifying the group is so powerful. My hope is that we have so many complex ties across cultures so that what we thought of as foreign becomes no longer so.

## **Randall Kennedy**

On the issue of discrimination, it might be useful to use the term "invidious discrimination." We all discriminate and some discrimination is good. We discriminate against rapists and murderers. We must ask what sorts of discrimination are justified. In this context, immigration raises difficult issues. States are the entities that sign documents. To have a community, you need a gate, with some people in and others out. States must define themselves. I would like to be a citizen of the world, but wonder if in fact I have that capacity. Will saying so be merely rhetorical? Or will I be stretched so thin to the point of having no link to any community? Rousseau called friendship a theft from humanity. We should all be friends, but what does that do to the notion of friendship? California Proposition 187 is an example of people asking whether a state has the power to limit immigrants and thereby define itself.

## **Peter Gomes**

These are not just American matters. The human rights movement would not have happened had it depended on the conception of rights and interests perpetrated by the United States immediately after the war. We were dragged kicking and screaming into the human rights enterprise. The issue of xenophobia manifests itself in the three phenomena discussed on this panel and is also the result of the three phenomena. If race is the fault line in America, nationalism plays the same role in international culture. Real nationalism is rampant everywhere. What is the difference between nationalism and xenophobia? Is xenophobia the natural result of nationalism or of failed nationalism? This zeal for the nation state with similar tribal inhabitants is as much with us as ever.

Somebody might say, it all comes down to sexuality in the end. Any variation or variety becomes a threat so fundamental that we build individual, familial, national, and international identities in the name of fighting against that fear and anxiety. Maybe we all need to turn not to Mother Theresa or Martin Luther King but to Dr. Ruth to examine what we are dealing with.