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WHAT IS A HUMAN RIGHT? UNIVERSALS AND THE CHALLENGE OF CULTURAL RELATIVISM

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INTRODUCTION

I am Paul Dubinsky from New York Law School.

The title of this panel is "What Is a Human Right? Universals and the Challenge of Cultural Relativism." We love titles like that because we know by the end that someone is going to be upset and we are going to have a lot of controversy.

As I was on my way over here, I was rereading the Universal Declaration.[1] It seemed like the thing to do on an anniversary. It is amazing the stuff you find in it the second or fifth or ninth time you read it.

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[1] *See* Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

For instance, I was looking at Article 16: "The family is the natural and fundamental group unit of society and is entitled to protection by the state," and so forth.[2] In every society, is that so?

Or Article 17: "Everyone has the right to own property alone as well as in association with others."[3] Property, a fundamental human right.

And Article 24: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."[4] Would that it were so.

I would like to start this off by saying it declares itself a Universal Declaration of Human Rights, but the fact is we differ so much from one another. In the obvious ways, in our gender, in our race, in where we live, in our geography, in what we have inside of us, which god we pray to and which god we do not pray to, our history, our wealth, and so on.

So to address the issues posed by that, we have four distinguished academics from four different schools in New York City, just to show the cultural relativism and the geographic spread we are going to add to this, mostly to address the question: "It might be fine thinking of these lofty thoughts here at Lincoln Center, but do we have the same rights down in Tribeca or in Brooklyn?"

To my furthest left is Professor Tracy Higgins from Fordham Law School. To my immediate left is Professor Jeremy Waldron of Columbia Law School. To my immediate right is Professor Michel Rosenfeld of Cardozo Law School. To my furthest right is Professor Ruti Teitel, my colleague at New York Law School.

Professor Higgins has taught at Fordham Law School since 1992. She teaches procedural subjects, such as civil procedure in federal courts, as well as human rights law, anti-discrimination law, and feminism; and, of course, she is the Co-Director of the Crowley Center here at Fordham Law School. She has participated in fact-finding missions to Afghanistan, Pakistan, and Turkey, and will lead one this summer to Hong Kong. I encourage you to read, as soon as it comes to your library, her

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[2] *Id.* art. 16.
[3] *Id.* art. 17.
[4] *Id.* art. 24.

forthcoming article, "Multiculturalism, Post-modernism, and Human Rights" in the *Columbia Human Rights Law Review*.

Michel Rosenfeld is the Sidney Robbins Professor of Human Rights at Cardozo Law School, where he also directs the LL.M. program. At this point, I think he has lectured on every continent, or most every continent. He is an officer of the International Association of Constitutional Law[5] and the U.S. Association of Constitutional Law. His writings range from legal theory, to affirmative action, to comparative constitutionalism, and he currently is an editor of *Philosophy, Social Theory, and the Rule of Law* published by the University of California Press.

Ruti Teitel is my colleague at New York Law School, where she is the Ernst Steeple Professor of Comparative Law. She teaches constitutional law and comparative law. I first met Professor Teitel when she was a Senior Fellow at the Shell Center for International Human Rights at Yale Law School. She has been on the Steering Committee of Helsinki Watch and has written "Human Rights in Transitional Regimes: The Role of Law in Political Transformation," in the *Yale Law Journal*.[6] Also stay tuned for her coming book, *Transitional Justice*, which will soon be published by Oxford University Press.

Our last panelist is Jeremy Waldron, who is the Friedman Professor of Law at Columbia Law School.

Over lunch, I was actually discussing the Universal Declaration with several people at my table. With respect to one provision in particular, someone at the table asked, "Isn't it really all just nonsense on stilts?" I said, "I don't know, but you should ask one of our next panelists because he wrote a book with that phrase in the title."[7] That is Professor Waldron.

He is also the Director of the Center for Law and Philosophy at Columbia. His writings have varied from political theory, to philosophy, to jurisprudence. He has taught in New Zealand, in Scotland, at Berkeley, at Cornell; and at Princeton, where he was the Director of the Program in Ethics and Public

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[5] *See International Association of Constitutional Law*, (visited March 1, 1999) <http://www.eur.nl/frg/iac/secr_e.htm>.

[6] *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

[7] *See* NONSENSE UPON STILTS, BENTHAM BURKE AND MARX ON THE RIGHTS OF MAN 1 (Jeremy Waldron ed., 1987).

Affairs. Most provocatively, he has written an article, entitled "A Right-Based Critique of Constitutional Rights."[8]

Now let me introduce our first panelist, Professor Higgins.

[8] *See* Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993).

Tracy Higgins,
Fordham Law School

In honor of the fiftieth anniversary of the Universal Declaration of Human Rights, this panel has been asked to consider the difficult question, "What is a human right," giving particular attention to claims of universality and the challenge of cultural relativism, all in an hour and forty-five minutes.

In my remarks, I want to address this theme — though not answer the question — by considering the Universal Declaration and the human rights framework it established, in light of an important political and theoretical development that has taken place during the period of its drafting, namely, the rise of what I want to call the "politics of difference," both within individual states and among nations.

This political development and its theoretical sibling, cultural relativism, have given rise to challenges to established conceptions of human rights as narrow and individualistic and, more radically, as a form of cultural imperialism. Hence, it represents a challenge to the central idea of the Universal Declaration, as Professor Dubinsky has pointed out, that a given set of rights belongs to us as human beings and transcends location, culture, ethnicity, or religion.

I confess that, as a feminist, I am sympathetic to multiculturalism and many of the critiques that have emerged from identity politics. At the same time, as a human rights lawyer, I am committed to the principles embodied in the Universal Declaration and to the idea that a standard exists by which we can engage in cross-cultural human rights activism. So, in my remarks today, I want to explore the challenges that are presented by the politics of difference to the Universal Declaration, and suggest perhaps some ways that those challenges can be met without undermining the power of that document as a yardstick of human integrity.

First, I want to set out my assumptions regarding our panel's central question, "What is a human right," and then explore briefly the various political uses of difference and the chal-

lenges to universalism that these uses may yield. Finally, I would like to offer a reinterpretation of these challenges as an affirmation of human rights as a common language in the multicultural community.

Most simply, a human right is one that is possessed by all persons equally by virtue of their status as human beings. So I answered the central question pretty simply, I guess.

The justifications offered for the existence of such rights range from natural rights arguments, to positivism, to utilitarianism, to social contract theory, among others. Philosophers and political theorists have attempted to ground the catalog of human rights on the requirement of human agency, on human dignity, or the preconditions for human flourishing, among others.

For example, Alan Gewirth has defined human rights as "rights of every human being to the necessary conditions of human action."[1]

George Kateb has also linked human rights to the qualities and capacities of human beings. He explains: "Public and formal respect for rights registers and strengthens awareness of three facts of being human: every person is a creature capable of feeling pain, is a free agent capable of having a free being, and is a moral agent capable of acknowledging that what one claims for oneself as a right one can claim only as an equal to everyone else."[2]

These characterizations are fairly typical, I think.

Now, there is, of course, much room for debate about the justification of human rights, their specific content, and the nature and scope of the corresponding duties that such rights entail.

Although Professor Schachter reminded us this morning that a natural rights foundation for human rights was largely taken for granted by the framers of the Universal Declaration,[3] much ink has been spilled — and, I confess, some of it mine —

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[1] ALAN GEWIRTH, HUMAN RIGHTS; ESSAYS ON JUSTIFICATIONS AND APPLICATIONS 3 (1982).

[2] GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE 5 (1992)

[3] *See* Panel 1: The Genesis of the Declaration: A Fresh Examination, Oscar Schachter, 50-51.

since that time concerning comprehensive theories of human rights. Such debates are clearly important.

However, elaborating such a theory of human rights is not my purpose here. Rather, I shall simply point out several common characteristics of contemporary human rights theorizing as it relates to multiculturalism or the politics of difference.

First, rights are generally considered entitlements of persons. Indeed, their content is frequently derived from a recognition of the attributes of personhood. This is true even though certain rights, such as linguistic or cultural rights, for example, can be exercised meaningfully only in groups.

Second, human rights, in a sense by definition, are abstract and universal rights independent of status, location, culture, or history.

Third, and following from the first two — the essential attributes of persons — those relevant to rights claims, are also in some sense assumed to be ahistorical and universal.

These characteristics of human rights, that they are both universal and individual, have been politically important to the growth of the human rights culture over the past half-century since the drafting of the Universal Declaration. In liberal theory and the human rights discourse influenced by it, "rights function as trumps," to borrow Ronald Dworkin's famous characterization. The recognition of rights stops political debate in that sense, removing the claim from the political process, in theory.

As such, rights seem to offer resistance against tyranny, whether from the democratic majority or from a dictatorial regime. More subtly, I think, as Patricia Williams has argued, rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being.[4] In short, the human rights regime constitutes the individual separately as a rights bearer against the community and collectively as a citizen of that community. The ideology of human rights, therefore, invites us to see ourselves as essentially human; as human beings first. It asserts a collective identity that encompasses the human species as a whole.

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[4] *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 153 (1991).

In contrast, the politics of difference in its various forms emphasizes the differences and peculiarities of cultures and of individuals; stressing diversity rather than commonality and, importantly, demanding respect, rather than mere toleration, for those differences.

The politics of difference has many guises, of course. Most familiar to Americans, perhaps, are identity-based political movements, such as feminism or gay rights, defined according to a shared characteristic that is politicized by discrimination in the culture. Elsewhere, ethnic nationalism has re-emerged, with groups claiming linguistic and/or genealogical kinship and revitalizing historical conflicts. Throughout the world, indigenous groups have mobilized politically to assert rights to land, to culture, and to sovereignty. Finally, fundamentalist religious movements, here and abroad, increasingly insist on the right to pursue traditional practices and structures of government that are at odds with international norms.

Each of these movements makes a claim of political solidarity and community that is based on a shared history, a shared culture, belief system, or other characteristics that are particular, that are not general, or at least, that are less than universal.

So what are the consequences of this foregrounding of difference for universal standards of human rights? My short answer is "it depends." First, it is important to note that, although premised on strong assumptions of commonality or universality, our existing human rights regime recognizes — indeed, values — diversity.

Existing human rights standards, including those defined in the Universal Declaration, can be understood as an effort to promote pluralism. For example, Article 2 guarantees the rights and freedoms set forth "without distinction of any kind, such as race, colour, sex, language, religion," et cetera. Article 26 speaks of education to "promote understanding, tolerance and friendship among all nations racial, or religious groups." It is a mistake, therefore, to characterize commitments of universality as foreclosing, in any sense, a healthy pluralism.

Second, to the extent that foregrounding difference has given rise to direct challenges to our human rights regime, those challenges are not monolithic. Although proponents of

multiculturalism have criticized universalist norms for being insufficiently sensitive to differences in culture, race, gender, et cetera, some challenges may be more easily accommodated within the existing framework than others. A much closer examination of the nature of these claims is necessary in order to assess the impact of such challenges from the politics of difference.

The complaints raised by cultural, ethnic, or other minorities that drive this politics fall into two general categories. First, such groups may complain that they are inappropriately defined as different or narrow, or exceptional, while the culture and the characteristics of the majority are accepted as neutral or universal, or at least representative of the general interest.

With regard to the first category, these kinds of complaints, these objections to being labeled as different, often give rise to arguments for a transformation through inclusion and calls for greater inclusiveness. These I want to call internal challenges to the dominant regime.

Second, minorities may complain that their distinctiveness is inappropriately ignored, that their difference is ignored or disrespected by the majority and that they are denied the opportunity to assert their distinct status in the political or any economic realm. Complaints of the second type most often give rise to arguments for the preservation of cultural values through separation from the community or exemption from generally applicable standards. As such, they represent external challenges to the norms of the majority.

I would like now to use contests over women's rights as examples in order to discuss how both internal and external challenges can simultaneously destabilize and expand our established understandings of human rights. First, to internal challenges. Over the last decade or so, feminist human rights activists and legal theorists have criticized the traditional human rights framework as inadequately safeguarding women's fundamental integrity, and hence perpetuating gender inequality.

More specifically, feminists have criticized the traditional focus of human rights standards on political and civil rights. Particularly negative rights against the state, as reflecting the view that the greatest threat to life and liberty of the individual

is the state. According to many feminists, in contrast, that view does not adequately reflect the reality of women's lives.

For women, the private exercise of male power more often threatens women's life and liberty. This exercise of power includes all forms of private discrimination, whether it takes place in the work place, in religious institutions, or in the family. It also includes all forms of gender-based violence, including sexual harassment and domestic violence. These private forms of power are often reinforced by the state, but they do not fit easily into our traditional conceptions of state action.

According to this feminist critique, by emphasizing these limits on state power, the traditional rights framework understates the need for state intervention to disrupt this traditional balance of private power, while reinforcing sources of such power.

Now, these arguments are potentially quite radical in terms of their impact on our human rights regime. One need only recall the recent resistance to the inclusion of gender as a basis for granting political asylum under U.S. law to see why. If we adjust our notion of international human rights abuses to include, not just what states do to their own citizens, but also states' systematic failure to protect some of its citizens from the actions of others, we risk "opening the flood gates" or "diluting the power" of core human rights protections, or so go the objections. We also include more enforceable obligations, I think, on the part of states to provide affirmative protections.

Despite the radical impact, I describe these arguments as internal to our human rights framework in the sense that they accept the aspirations of the existing scheme at a general level, but argue that those aspirations have either been improperly defined in some ways or inadequately met.

For example, the feminist critique generally accepts the assumption that individuals are rights bearers and that those rights are universal. There is not a quarrel, generally, with those two aspects of human rights rhetoric.

To the extent that the critique rejects the assumptions regarding universal personhood, that rejection is based on the claim that personhood has largely been defined in male terms. In other words, feminist critics are engaged in an effort, I think, to recast basic rights to address more fully the needs of women.

Though in some sense radical, such internal challenges, I think, should not be seen as threats to the human rights framework but, rather, opportunities to see it in a new light.

Consider the Universal Declaration whose birthday we celebrate. What can feminists find here? Well, Article 1 obliges "all human beings" — not states, but all human beings — to "act towards one another in a spirit of" sisterhood — actually, it says "brotherhood,"[5] but you get the idea.

Article 2 says, "Everyone is entitled to all the rights and freedoms"[6] — again, no reference to state action there.

Article 3 says, "Everyone has the right to life, liberty and security of person"[7] — again no mention of the state. And this provision, I think, can most logically be read both as a negative right against the state deprivation of these rights, and perhaps as a positive right to legal protection from such deprivations by non-state actors.

Article 23 addresses rights in the work place and can only logically be read to apply to private work places as well as public.[8]

In short, the plain language of the Universal Declaration seems to go well beyond the actions of states to confer duties on non-state organizations and on individuals. Read in this way, it addresses many of the substantive concerns raised by feminists regarding the abuse of private power.

Now to external challenges. The second category includes multiculturalist claims located largely outside the existing framework. They argue for the preservation of cultural values through separation or exclusion.

In the face of such challenges, we might ask to what extent a human rights regime, committed, at least in part, to toleration and pluralism, must accept the intolerant sub-community. Here again, I turn to the example of women's rights to illustrate because it is often in the area of women's rights that the debate over culture and religious values is brought to bear.

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[5] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

[6] *Id.* art. 2.

[7] *Id.* art. 3.

[8] *See id.* art. 23.

How should we respond to communities that invoke religious or cultural justifications for the practice of polygamy, or female genital surgery, or the maintenance of strict rules of purdah? One response is to look more closely at claims of culture and religion and ask who is asserting them, who is speaking for the culture, and who might be resisting. In other words, to question who is entitled to speak on behalf of the dissenting sub-community and ask whether the cultural defense is being asserted in good faith. Certainly, culture and religion are sometimes invoked cynically to mask oppression.

But I want to make a different point here. I want to take the best case for cultural claims, that they are asserted in good faith, and represent a consensus among those affected by the practice. So stated, these external challenges in some ways represent a much more difficult problem for the international human rights community than do internal challenges, in that those raising the challenges do not seem to embrace the basic commitments of the community; they merely want out, exemption, exclusion. Nevertheless, I think on closer examination, common ground can be found.

Consider the reasons that such challenges are difficult for human rights advocates, and even for feminists, to respond to. What distinguishes female genital surgery, polygamy, or purdah from ethnic cleansing or torture? Some may say nothing. But for the most part, I think there is a distinction, and it lies in the justification offered by those invoking the politics of difference. These challenges are difficult precisely because the defendants of such cultural practices tend to invoke justifications we are obliged to respect.

Again consider the Universal Declaration. Articles 18 and 19 guarantee freedom of conscience and religion and the freedom, either alone or in the company of others, in public or private, to manifest religion or beliefs in teaching, practice, worship, and observance.[9] That these rights are in conflict with other rights, specifically the right to be free from discrimination on the basis of gender, presents a difficult problem. But I would argue it is not a problem that can be attributed to multiculturalism or to cultural relativism per se. Rather, it goes to the

[9] *See* Universal Declaration, *supra* note 5, arts. 18-19.

tensions that are built into our foundational human rights documents.

Moreover, the very invocation of the language of rights by those groups engaged in these practices that we might find objectionable, brings such groups into a common discourse. By making rights-based arguments, the defenders of cultural practices submit themselves, at least rhetorically, to the dominant community and its legal structures. This rhetoric signals the desire, not so much to be left alone, but to be embraced; to be respected by the rights-regarding community.

To conclude, what are we to make of these multicultural challenges? I would argue that, on a practical level, the current debate over cultural relativism as a limitation on the scope of rights reflects, in a sense, the triumph of human rights discourse, even at the point at which it is questioned.

We might posit theoretically a community that responds to human rights criticism by claiming complete separation; insisting on the utter irrelevance of rights-based standards. Indeed, we might even point to a few examples — today's Afghanistan comes to mind.

For the most part, however, even human rights dissenters speak in the language of rights — namely, conflicting rights. We are left, then, with a different kind of problem; a problem, not of defending human rights per se against burgeoning claims of difference, but of articulating a hierarchy of rights that diverse communities can respect.

The Universal Declaration and the human rights discourse it has generated have helped to give us the language. It is up to us to carry on that conversation.

Thank you.

Michel Rosenfeld
Cardozo Law School

First of all, I agree with much that was said, and I, inevitably, am going to speak to some extent of the same issues. I will try to make things a little different and try perhaps to present points, since this is a short presentation, in a more confrontational way so that, hopefully, it will generate disagreement and discussion.

I look at the problem of universalism versus relativism, and I think that the problem is in many respects oversimplified and overdrawn. There are, first of all, not one type of universalism, but several types of universalism, and I will briefly discuss this.

On the other hand, I think that we forget sometimes that the opposite of universalism is not relativism, but particularism. While there is a strong tension between universalism and particularism, it does not necessarily have to yield relativism. Now, let me try to flesh this out a little bit.

The other thing that I would like to do in posing these problems is to look, albeit very briefly and very schematically, at the historical origin of the human rights movement.

One of the ways in which one ought to define such general notions as human rights, or "what is a human right," is in terms of what does that stand against.

In a sense, fifty years ago, the Universal Declaration stood against, of course, the horrors of Nazi Germany. I think that agreement, on that very general level, is uncontroversial and that it is universal, in the sense that it is a repudiation of something that is particularly abhorrent and, hopefully, will be warded off forever (although, unfortunately, we still have genocide, torture, and murder in too many places in the world).

The Declaration, with its two parts, and the two Covenants that followed from that, represent, depending on your point of view, either a dichotomy that has not been resolved, or an attempt to resolve the dichotomy between two conceptions of universalism:

> One being the liberal conception of universalism, which is steeped in enlightenment philosophy, individualism and liberalism; The other one the Marxist conception of universalism, which is steeped on a collectivist approach, but is also, we should not forget, a universalistic proposition: that all human beings are the same; we are going to destroy the borders of countries; the proletariat of the world; we will rule the world.

We may laugh at this today, but there is an important aspect of this which we should still take seriously. That is, the notion that human beings all over the world have the same problems; that problems are not merely to be looked at in terms of individual questions, but in terms of collective interests and collective concerns, but still from a point of view that all human beings are the same and have the same aspirations.

It is not, therefore, an accident by any means, that upon the dissolution of the Soviet empire there should be such a rebirth of nationalism, ethnic ideologies, and so forth.

So, we have these two forms of universalism; on the one hand, the liberal universalism; the other one, collectivist universalism — the rebirth of particularisms, which is problematic in many respects.

There has been a distinction drawn between what I could call particularisms of lifestyle. These are feminism and gay rights. In other words, within one culture there are different parts of the culture and there are problems of inclusion and exclusion of various constituencies within the same culture.

On the other hand, you have what is known as nationalism, or ethnic nationalism, where we are dealing with sometimes cultural differences, religious differences; where we are dealing with a totally different ideology. The two are not always the same, nor can the same solution be given to the two kinds of challenges that they raise. I think it is important to keep this in mind.

In any event, the ethnic-cultural renaissance, if you would like to call it that, poses an important problem which meets, I think, insufficiencies of the liberal ideology. The liberal ideology constructs, as was pointed out, a very abstract individual.

Rights are spoken of in very general terms. Human rights or other fundamental constitutional rights are spoken about in very general terms. We see a deficit in substance. There is a long tradition now, and I will not go into it, of criticizing even the best liberal theories in terms of it being too abstract.

I think another thing Professor Higgins pointed out in her talk, which I fully agree with, is we have this notion that the abstract individual in modern Western liberal theory tends to be a male. Even though it is not said it is a male, it is more the image of man than the image of woman.

So if one wants to — and I think this is a serious philosophical issue — if one wants to take the position that it is impossible to have an abstract individual because, whatever conception you have of an abstract individual, when you start speaking at the abstract level, you are going to sneak in certain particularities, whether it is male/female, or whether it is race.

I think the example of race is very good here. We could imagine an individual that is neither black, white, nor any other race. But when we talk about that individual in the abstract, somebody who is listening to our discourse will find out what our model is because we cannot abstract the color pigmentation of the skin; we cannot abstract historical experience, tendencies, injustices in society, to what extent those contribute to making a person and defining the problems that are important to the person.

So, as I say, on the one hand, there is this problem of the abstract individual and the ways in which to try to deal with this problem. An ethic nationalism responds to that in historical ground, in culture, in religion.

Another phenomenon that has been discussed over the last thirty to forty years — perhaps twenty years more intensely — is what one author has called the "deprivatization of religion." The liberal notion is that we ought to have religious tolerance, and that religion is a private matter and that matters of politics and the state should be largely removed from issues of religion.

As has been pointed out in many contexts, this is not true, and it is less and less true in the world. Not only do we have the rise of Islamic fundamentalism in certain countries, but even in Western countries, the rebirth of the conservative religious right in the United States. But in other countries, for example

in Brazil, it was some members of the Catholic Church that were very instrumental in bringing progressive change; in Poland, the church was instrumental in the transition from Communism to democracy, and so forth. But religion has become more and more injected into politics, which makes this notion of abstract individual general rights more difficult to deal with.

One other issue is the emptiness of the abstract individual has led some people to try to rethink nationalism. Of course, we all abhor the more extreme forms of nationalism, intolerance and so forth, but many realize that it is impossible to have a society built simply on market and certain general abstract rights. Therefore, there has been a return to considering what is the content. We have to have a sort of thicker vision of the society and of rights.

What is the content of that vision? One attempt, which I do not think is entirely successful but nevertheless is noteworthy, is that of Yael Tamir, who wrote a book, called *Liberal Nationalism*, trying to take the best of the liberal tradition and the nationalist tradition.[1]

From a philosophical point of view — and I agree also with Professor Higgins — I want to make a distinction between the philosophical and the practical, although I am a believer that the two are not completely separated. Certainly philosophical thought has influence on our practical life, and practical concerns, hopefully, have importance for philosophy. If you approach a problem from a practical point of view, you may not be troubled by this, but I think conceptually it is problematic, and eventually, when you reach certain cases, you cannot avoid the problems.

One of these problems is the problem of group rights, which is the one that I think brings out most acutely the issue of where do we draw the line between particularism and universalism. Some of the problems were already mentioned in terms of feminist issues. Some of the problems are relatively easy, at least we feel, even if we cannot conceptually justify them; this is where I draw the line between philosophy and the practical issues.

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[1] *See* YAEL TAMIR, LIBERAL NATIONALISM 1 (1995).

Most of us have, I think, a relatively easy time answering: "Yes, female circumcision, from what we know about it, is a practice that ought to be stopped regardless of cultural claims to it, because it apparently causes pain and submission and it is done on people who have not reached an age where they can be considered to have accepted that." So that is a relatively easy case.

Other cases, though, are much more difficult. To illustrate, in philosophical terms there are two examples that are not that far apart, although practically they are, at least for us today.

What about male circumcision? In certain religions it is performed at the age of eight days, in others at the age of thirteen; still ages at which the victim — if you would like to call that person a victim — is not able to fend for himself or to give his consent. Can we evolve in terms of our notions of personhood, integrity, and trying to liberate each citizen to the point that decisions such as that ought to be made by a conscious adult? Can we foresee, for instance, a society, like the United States, forbidding male circumcision, notwithstanding that a substantial portion of Americans — Jews, Muslims — would consider that against their religion? What is the difference philosophically? Where do we draw the line?

What I would like to emphasize here is that the general principles by themselves, or the particular cultures by themselves, cannot solve this problem. We can go in two directions. Either there is the answer from the general abstract liberal point of view — but it is not satisfactory; it does not take into account difference; it does not take into account particularity of culture, and the liberal point of view always is, at least implicitly, biased in favor of one culture against another.

On the other hand, a particular answer does not seem to be acceptable to many of us in many cases. The most extreme cases are easy, but we can add a whole series of cases that are much more difficult to deal with.

Because we think of ourselves as a society that lives in a melting pot, the whole notion of group identity is challenged. Our constitutional jurisprudence is very strongly against the notion of group rights or equal protection clauses when interpreted as applying to individuals and not groups.

There are a couple of exceptional cases that implicitly recognize group rights. One of them is the *Yoder* case, which is a free exercise case, in terms of the Amish as a separate community.[2] The Amish are a separate, self-sustaining peripheral community. The implicit recognition in that decision of their group rights does not have much resonance for most Americans.

The other decision is one concerning Native Americans which is very troubling. The Supreme Court itself did not decide on the merits of the case. That is the *Martinez* case.[3] The issue there is a typical clash in terms of what is the particular versus the universal, general, and liberal position. A woman within a Native American community claimed that the community, by excluding her because of the tribal rules (there is a special congressional act because the Indian tribes do not come under the Constitution in this respect) violated the equivalent of her equal protection right because of a group collective determination that, having not followed some of the tribal rules, she should be excluded.[4] Now, the Supreme Court said "we have no jurisdiction over that," which in fact meant that it is the tribe that decides the issue.[5]

The issue is troubling because within the tribe, she had no rights as a woman which a man in her position would have, so there is a clear violation of equality between men and women. On the other hand, to impose a certain result on the group would be tantamount to, for instance, the state telling a particular church that they have to make women members of the clergy although the congregation does not believe in that.

These are the problems that I think cannot be avoided. So what is the solution?

I would like to propose one solution, but first I am going to mention the one suggestion which I disagree with, which is a suggestion made by Kymlicka, who speaks about two different situations in terms of group claims and group rights.[6]

In terms of group rights, he says, the group ought to be given external protection. Any attempt from outside the group

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[2] *See* State of Wisconsin v. Yoder, 406 U.S. 205 (1972).

[3] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[4] *See id.* at 52.

[5] *See id.* at 71.

[6] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995).

to influence the group, for instance, in a state trying to restrict religion — ought to be prohibited. So the right of the group to survival, to their own cultural, ethnic, or religious identity, and to ruling their own affairs ought to be protected.

He has, of course, in mind larger ethnic groups, so it does not exactly fit the American situation, because America in that sense is an exception. But if you take Quebec in Canada or aboriginal groups in Canada or the Catalan minority in Spain or the Basque minority, this would be an argument for letting them rule their own internal affairs.

On the other hand, he says internal restrictions by the group ought not to be tolerated. Internal restrictions are when the group does impose rules on an unwilling participant or an unwilling member that are not considered acceptable by society at large or by the majority, and the individual has to submit him or herself to those rules. That sounds good, but I think that does not solve many problems.

In particular, its problematic because what this leads to is the right to exit: if you do not like the rules of the group, you can leave the group — which is, of course, an important right, but I do not think it is sufficient.

The problem is that there are people who want to change groups from the inside. This is where I see the possibility for a solution to the problem of particularism versus universalism. That is, in today's world there are very few groups that are completely isolated and have no dealings with the society at large. There are really two sets of problems. One can call them intergroup relations (in a multiethnic society, for instance) and intragroup relations.

It seems to me that there is no clear-cut answer as to how rights ought to be used in terms of solving these problems, but one ought to be sensitive about the issues, about finding some kind of balance. So, instead of having a universalist answer or a particularistic answer, one ought to have a pluralist answer, meaning one ought to look at the claims, weigh the claims, and take into account the desire, for instance, of individuals within the group to, instead of exiting, generate changes within their own groups.

So what we need is a regime — in a sense, a redefinition. We can use the Universal Declaration. I read it too on my way here today.

There is in the language of the Universal Declaration enough room to interpret these rights in ways which can accommodate this apparent dichotomy between universalism and particularism. Maybe some bridges in that way can be forged that will lessen these problems.

Jeremy Waldron,
Columbia Law School

In the controversy about universal human rights versus relativism, there are three strategies that the defenders of human rights resort to. Two of those strategies involve the use of examples. And, just so that you can keep count, I am going to talk about three strategies, two with examples, and then I will follow them with two points. So there are going to be five things altogether and then I will stop.

In the first, when we are defending universal human rights, what we try to do is identify a form of oppression which horrifies everyone, or which we have reason to expect would horrify anybody from any social or cultural background.

Torture, particularly in its most extreme forms, is a fine example. The example of torture works well for this purpose because, although we are aware that torture remains common practice in many societies and many cultures, we also know that it terrorizes those who suffer it or hear about it even in the cultures where it is common. That is the way it is intended by its perpetrators, as a form of terror.

It is not hard, therefore, to argue from the standard and predictable abhorrence of torture in every culture to its condemnation as a universal moral evil. Everyone fears torture. Every authorizer of torture expects and hopes to be feared by victims and potential victims in a society. So no one is going to accuse opponents of torture of applying their own peculiar or parochial sentiments to societies in which those sentiments are not widely shared.

Moreover, although moral and political arguments, or philosophical arguments, are imaginable in which torture might be justified, for example, the hypothetical terrorist who planted the nuclear device in Paris, the pragmatic reasoning that is used in those examples is familiar in all societies, and the defects in that reasoning and the arguments for resisting that reasoning — arguments set out best, I think, by Henry Shue in an article on philosophy and public affairs in 1978 — are also well-

known and intelligible to lawyers, politicians, activists, and ordinary citizens of every creed and culture and every ethical and political tradition. That is a first sort of example.

The second sort of example is intended to be equally horrifying but addresses a slightly different problem. Here I will use the same example as some of my other panelists have used, the example of female genital mutilation.

Unlike torture, female genital mutilation is not usually cited as a practice that is universally abhorred, but rather as a practice that is part of the cultural tradition of certain societies, but which is nevertheless abhorred — and, according to the argument, rightly abhorred — by people viewing those societies or cultures from the outside. It may also be abhorred by some inside, but that is a separately important point.

Unlike the case of torture, the example of female genital mutilation is supposed to address the relativists on their own ground. It accepts the relativist anthropological point that moral ideas and conceptions of decent treatment vary from society to society, but this particular cultural practice so offends us in civility that the example invites us to condemn the practice, notwithstanding its establishment in a culture.

The example, therefore, is supposed to help stiffen the confidence of people like us in our ability to criticize "funny" foreign practices abroad, and stiffen our confidence in the legitimacy of human rights ideals even in the face of relativist objections. It invites us to trust our intuitions that certain practices are vile, even though we know that there are people, or whole societies, that regard those practices as morally acceptable, or even right. Most of us, therefore, as Professor Rosenfeld said, have an easy time saying, "Yes, this is a practice that ought to be stopped, even though we know that it is a practice."

The third strategy is more philosophical than the other two. It is more than the simple production of an example together with an appeal to the audience's intuitions. The third strategy involves a philosophical argument about the abstract possibility of culturally transcendent and genuinely universal moral standards.

The third strategy seeks to, as it were, cut off at the philosophical pass any general relativist attempt to discredit the intuitions conjured up by examples of the kind I have just

mentioned. Because, after all, it is not enough certainly to produce the intuitions; you have to kind of make them philosophically respectable, or at least defeat any philosophical case that is mounted against them.

So, you have a relativist who might say something like the following: "Look, of course the psychological intensity of your particular parochial abhorrence of things like torture or clitoridectomy will lead you to project those sentiments even beyond the bounds of the culture that nurtured them." "But you've got to understand," the relativist goes on, " that that is a mistake. Social, moral, or ethical standards are not just culturally rooted; they are culture bound, and any attempt to apply them beyond the culture of their provenance is simply incoherent." That is what the relativist will say.

The universalist's third strategy is to discredit that as philosophy. The universalist will respond: "There is nothing about the way in which moral judgments are formed or generated or nurtured which necessarily restricts the range of their application. Just as penicillin kills bacteria in Asia, even though it was discovered in Scotland, so the categorical imperative might explain why it is wrong for one African to tell lies to another African, even though the categorical imperative was first theorized in Prussia."

Of course, the philosopher will concede that various moral arguments — indeed, various judgments and other objective wrongs as well — may have presuppositions that are not satisfied in every social or cultural setting. For example, in economics, the claim that a lowering of unemployment tends to raise the rate of inflation may be known to hold only in societies where there is something like a labor market; it may not hold in cases where the level of productive employment depends on, say, traditional responses to cycles of drought and fertility.

Similarly, the political or legal claim that people have a right to trial by jury may make sense only in a society which has a certain sort of organized system of criminal procedure.

Also — and these are just trivial examples — in a slightly different way, statements like "adultery is wrong" or "theft is wrong" may make implicit reference to the particular property and matrimonial arrangements of a particular society, and you

cannot know what counts as theft until you have become acquainted with the local rules. That can all be conceded.

But that sort of relativity, which is respectable relativity, of norms to social presuppositions, or of norms to institutional settlements, has to be established case by case; that is, norm by norm. It cannot form the foundation for a general relativism of norms to societies or cultures. It certainly cannot be used to discredit our practice of morally evaluating the very institutional settlements and the very social presuppositions which are themselves referred to in this more respectable form of relativism.

So, anyway, in the third strategy there are various arguments along these lines, distinguishing between "reputable" forms of relativism and "disreputable" forms of relativism, and showing that any relativism that affects human right is reputable but that human rights is not affected by that.

Bernard Williams, for example, talks helpfully, in *Ethics and the Limits of Philosophy*, about something he calls "the relativism of distance."[1] He gives us a useful reminder that not all cultures or ways of life present themselves to us as members of a single choice set among which a trans-cultural evaluation could usefully guide us.

For example, the life of a samurai warrior is simply not available to me as a law professor in the United States at the end of the twentieth century, so that any ethical comparison of these two ways of life by me is purely notional. If I say, "Look, the way of life of an American law professor is morally superior to that of a samurai warrior," I come close to incoherence because the prescriptive implications of my statement are quite unclear, given that one of the things being compared is simply not an option to the person making the comparison. So that is respectable relativism, relativism of distance.

At the same time, Williams also argues, equally cogently, that knee-jerk cultural relativism of the sort that used to be espoused by philosophy students who had also taken courses in anthropology is, to use Williams's own words, 'possibly the most absurd view to have been advanced even in moral philosophy."[2]

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[1] *See* BERNARD ARTHUR WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 163 (1985).

[2] *Id.*

If actual pursuance to moral judgment is possible, if different cultures and societies interact with and are in a position to learn from each other — and the overwhelming majority of societies are in this position, and always have been throughout history eager to study, evaluate, and if possible, appropriate the views of cultures of their neighbors or their enemies or their trading partners — if those conditions are satisfied, then there is nothing but absurdity in the claim that each society's standards are right by their own rights but cannot be extended beyond their boundary. That would be like the relativist trying, in a sort of strange way, to discredit human curiosity.

What the defender of human rights needs to do, then, is to show that the kinds of judgments that are made in the human rights industry do not fall under any of the respectable forms of relativism, and that any relativist critiques of human rights doctrine are of the second (disreputable) sort.

Now, it may be thought that of all the moral claims that we make – i.e., abortion is permissible — human rights claims sometimes come pretty close to the relativism of distance, to use Williams's phrase.

Consider again the example I used earlier, the example of female genital mutilation. It is probably unthinkable for a feminist law professor or a political science professor in the United States to imagine herself adopting the life and culture of a Muslim girl living in conditions of peasant subsistence in a sub-Saharan village. And so, there is something fatuous about the simple claim that the situation of the former is morally superior to that of the latter. The American professor simply does not face the choices that an evaluation of that kind appears to prescriptively address.

And similarly, for the same reason, we simply do not bother to use human rights doctrine to condemn cannibalism or human sacrifice because we know that the ways of life of, say, Maori cannibal warriors or Mezo-American sacrifice cults are so distant from us in time and history that they are beyond the reach of the choices that any current evaluation of prescription could possibly hope to guide.

But, I guess, what I want to say about the female genital mutilation case is that it is not quite beyond the realm of current choice in this way. On the one hand, there are things that

we can do to influence what takes place in a country like Somalia, for example. Although there may not be a lot we can do, as this country learned to its cost some years ago. But there are choices that we have to make — or the people we know, like aide workers, have to make — that do involve a meaningful evaluation of the acceptability of the practice of female genital mutilation. Not least among these choices are our responses to asylum pleas from girls and young women seeking to escape this practice.

And, on the other hand — and this is a point that I think is important for what follows, and one should never forget this; and here I think I differ slightly from Professor Higgins and Professor Rosenfeld — as I understand it, female genital mutilation is not just intended by those who practice it as a sort of tribal mark or tattoo, like male circumcision in the Jewish world. The doctrine behind it, to the extent that there is a doctrine, is put forward as an implicit reproach to some of our views about women and about sexuality. It may not be a valid or a convincing reproach, it may be a reproach that we would like to take serious issue with, but there is certainly disagreement, or competition, between the views about women and sexuality that these practices represent and the views about women and sexuality that are presupposed when we make our criticism of these practices —the point that Yael Tamir made in her article on clitoridectomy in the *Boston Review of Books* in November 1996.[3]

And so, even if no one is proposing to extend the practice of female genital mutilation to the West, these opposing views simply cannot be treated relativistically. They have to be seen as confronting one another, each on the other's turf, and they cannot both be right, although they possibly may both be wrong. I want to return to this point in a minute.

Let me just reinforce, though, the anti-relativist position. Overall, I suspect that culture boundedness is the exception, not the rule, in ordinary human moral discourse. Most of the time when people state moral positions, they do so without reference, either implicit or explicit, to the boundaries of their culture. When we say, for example, "all humans are created equal"

[3] *See* Yael Tamir, *Hands Off Clitoridectomy*, Boston Review, Oct./Nov. 1996, at 21.

or "slavery is wrong," we do not intend at all to qualify or limit that with a cultural reference, "this is just what we happen to think around here." We intend the categorical and universal character of these utterances to be taken at face value and to be evaluated as such.

Well, the same applies to most of the moral or ethical views, including the disconcerting moral or ethical views we hear coming out of societies other than our own. They too are phrased categorically and universally, and they too intend that phrasing to be taken at face value, even when they know that their claims conflict with ours.

So when a Taliban activist or an Iranian cleric says something like, "Pornography is inherently degrading and any society which tolerates it as a matter of principle is irredeemably corrupt," he intends that to apply to us every bit as much as we intend our high-minded structures about civil freedom to apply to him.

True, our first response may be to say that religiously based views like that have no place in public discourse, but that is something that he is likely to disagree with in the wake of this deprivitization of religion that Professor Rosenfeld mentioned. And, once his disagreement is expressed, we can no longer regard our own tortured settlement of the boundaries between church and state as something which is privileged or self-evident. That settlement too is now under pressure and we must respond to that pressure intellectually the best way we can.

So this brings us to the final two points that I want to make, two points which I intend as the burden or moral of my remarks this afternoon.

The first is this: If we take the human rights norm and try to apply it to another cultural society and we find it resisted on the grounds of a contrary evaluation which is, let's suppose, typical of that other culture or society, then that contrary evaluation should not be regarded simply as an objection to the universality of our claim. It will usually amount to an objection to the content of our claim, even on its home ground, even to the extent that we apply it comfortably among ourselves. That is, if we give up relativism, we've got to really give up relativism and accept that other cultures are offering implicit critiques of us as we are offering implicit critiques of them.

So, the pornography case I mentioned a moment ago is a clear example. Suppose we object to some interference with ordinary people's access to the Internet in Iran, and we do so on the grounds of the human right to free speech and freedom of communication. We say, "This censorship, this interference, is a violation of human rights." The Iranian authorities reply and justify their interference on the grounds that it is necessary to suppress the influence of pornography, which they have reason to believe, from our example, will be the most common use that people would make of the Internet if it were available.

We then say, in our swaggering arrogance as human rights theorists in the United States, that pornography is and ought to be protected under the principle of free speech which human rights documents enshrine.

Now, to this the Iranian clerics may make either of two replies. If they are stupid, they will make a silly, relativist reply, saying, "Well, we organize our society differently from the way you organize your society." But they may make the following reasonable, although undoubtedly contestable, response and say what I imagined them saying a moment ago, "Pornography is inherently degrading and any society, including yours, which tolerates it as a matter of principle, let alone as a matter of human rights, is irredeemably corrupt."

Now, that is a response that addresses the content of our human rights claim, and we have to be able to answer it. The human rights claim now no longer stands privileged. We are back to debating about what its content should be. This is not a relativist objection to human rights universalism; this is a direct objection to the corruption and decadence allegedly embodied in our standard. And, if we cannot answer it, and answer it adequately, then we are not entitled to regard our toleration of pornography as valid even for us, let alone as a right standard to be inflicted on others.

My point, then, is that often the relativism thing works both ways. I do not think we are entitled to sanitize or fence off the Muslim response, say, to our toleration of pornography as nothing but relativist resistance to the universalization of our standard. It is much more important than that. Precisely because relativism is, for the most part, silly and misconceived as a philosophical position, any plausible resistance to the univer-

salization of our human rights doctrine can only be taken as a direct challenge as the substantive adoption, and it has to be addressed as substance.

My second, and final, point follows quite quickly. If we are going to strut around the world announcing human rights claims in universal terms, the only thing that can possibly entitle us to do that is that we have carefully considered everything that might be relevant to the moral and ethical and political assessment of such claims.

It is not enough that we have considered what Kant said to Fichte or that we have considered what John Rawls said to Will Kymlicka. The price of universalist moral posturing is that we have to make a good-faith attempt to address whatever reservations and doubts and objections there are about our positions out there in the world, no matter what society or culture or religious tradition they come from.

In other words, if we are going to be universalists, we have to develop practices of moral and philosophical argument on the genuinely cosmopolitan scale. Apart from that enterprise and that discipline, we have no more right to be confident in the universal validity of our intuitions than we think our opponents ought to be in theirs.

Of course, that is a very, very, very difficult assignment, because such doubts and reservations and objections would often challenge, not just the content of our conclusions, but our whole frame of looking at the issues that we are addressing.

Let me finish. I am not a relativist, I am a cosmopolitan. I believe some human rights standards can be arrived at and ought to be upheld and enforced everywhere in the world; but, just because relativism holds in general, we are not entitled to assume the right to enforce whatever tentative conclusions happen to have emerged from our particular inbred set of debates about politics or welfare or free speech or autonomy. Until those debates are enriched in the cosmopolitan way, with an awareness of what is to be said about them and around them and against them from the variety of cultural, religious, and ethical perspectives that there are in the world, they remain parochial; and we stand accused of the stupidest, most arrogant form of moral imperialism if we wander around trying to impose

our way of life without sensitively confronting the basis of other people's and other cultures' resistance to it.

Certainly, if we try to dismiss all such resistance as relativism, we will, I think, end up consigning human rights discourse to a rather unpleasant and morally impervious relativism of its own.

Ruti Teitel
New York Law School

It is a pleasure to be here. Considering the competing entertainment and anguish going on in Washington, it is heartening to have this audience.

What I would like to do is pursue the question of the universal and the particular in the context of international criminal justice. Let me begin.

The late Judith Shklar has written, in dating the modern moment in response to the Lisbon earthquake, that for her, this was the beginning of the modern moment because, instead of the characterization of the catastrophe as a misfortune, the response was to go beyond that and to see this catastrophe and the suffering as unjust. In her book, *The Faces of Injustice*,[1] she elaborates why.

By analogy, the modern human rights moment in our view appears to commence in the legal responses in the post-war period, and in particular, in the commitment to individual accountability to enforce individual rights with its arch-symbol, the Court at Nuremberg[2] as coinciding with the development of the modern human rights movement.

Consider the coincidence of the anniversaries of the International Military Tribunal proceedings with the Declaration of Human Rights.[3] Most of us are spending our time observing and commemorating and living a historicized view of human rights, which is contemporary as well. As we approach the end of the century, the recurring images of the instantiation of human rights are more and more likely to be juridical and punitive.

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[1] JUDITH SHKLAR, THE FACES OF INJUSTICE (1990).

[2] *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter](Article 6 of the Nuremberg Charter states that there shall be "individual responsibility" for the commission of those crimes which fall within the jurisdiction of the Tribunal). *Id.* art. 6.

[3] 1945 and 1948 respectively.

In discussing developments in international criminal law I would like to pursue the tension between the universal and the particular. Whether in the convening of the adhoc international criminal tribunals regarding the Balkans[4] and Rwanda[5] and the entrenchment of the Nuremberg-style International Criminal Court in July in Rome,[6] to the recent dramatic arrest of General Pinochet,[7] the recurring images of the instantiation of the rule of law in human rights are of criminal accountability.

My remarks here attempt to explore these developments and to suggest that international criminal law is being put to the task of doing the work of construction of liberal identity, and it is explicitly being used to attempt to transform illiberal identities of states under authoritarian and totalitarian rule.

Here, as we shall see, there are conflicting normative paradigms at work. There is the historical, the post-war paradigm, the politics of universalism, where humanity is the standard, as opposed to the more contemporary challenge, a paradigm of particularism. One explanation for the resorting to international criminal law is its potential for mediating the universal in local applications, in particular, international criminal law enables the ascription of individual agency and representation of individual rights and accountability, in this way appearing to hasten liberalization.

Nevertheless, I want to suggest that, whatever criminal law's potential for advancing liberalism, that what is at stake is a very thin liberalism. International criminal law seeks to individuate individual responsibility and can enforce equal values, such as equal protection of the law, both as to defendants and as

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[4] *See* The International Criminal Tribunal for the Punishment of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993).

[5] *See* The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, S.C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994).

[6] *See* United Nations Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 999 [hereinafter Rome Statute].

[7] General Augusto Pinochet was arrested on October 16, 1998 in London pursuant to an extradition request the British government received from a Spanish judge.

to victims. Nevertheless, international criminal law advances a rule of law that is largely procedural, and dedicated to the preservation of juridical rights rather than ultimate substantive advancing and protecting human rights.

The reasons are complicated, and I want to give you some examples of why it is that ultimately the tension of the universal and the particular that emerges in these examples of international criminal proceedings suggests that international criminal law cannot do the work of transforming illiberal identity politics. The main reason is that this response fails to adequately deal with the critical issues of ideology and policy that are at the cause of contemporary political violence.

Let me begin by turning to the politics of universalism, and then I will turn to some countervailing examples in the present movement.

If we begin by looking at the genealogy of modern human rights law, historically international criminal justice represents universalism in international human rights. The genesis of the modern human rights movement, which I mentioned earlier, coincides with the proceedings at Nuremberg and the subsequent case law. There are affinities between these developments and the attendant development of constitutionalism, and there appear to be similar values and affinities in these developments in the post-war period.

How does the international tribunal at Nuremberg epitomize the symbol of universal human rights? In the substantive charges brought, particularly in the adjudication of the crime against humanity, as defined in the Nuremberg Charter,[8] as well as in the subsequent Control Council Ten Laws.[9] At Nuremberg, the crime against humanity was implemented in prosecutions for the inhumane acts committed against civilians during the war.[10] The normative message adjudicated was that, despite war, there would be protection of core concepts of universal human dignity.

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[8] *See* Nuremberg Charter, *supra* note 2, art. 6(c).

[9] *See* Control Council for Germany, Official Gazette, art. II, *reprinted in* YOUGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 23 (1982).

[10] *See* Nuremberg Charter, *supra* note 2, art. 6(c).

Now, what is very interesting is that, despite the pretensions to general theory adumbrating standards of universality, the post-war natural law theory that animated these legal responses, whether the international trials, or the attendant constitutional developments, arises in applications in a particular context: the Allied response assumes particular understandings of the nature of Nazi illegality. And so, these proceedings reflect the view of the role of universal rights as a direct response to totalitarianism and the then reigning view that the perversion of Nazi rule derived from moral relativism implicit in Nazi legality and associating the repression of the Nazi regime with its putative positivism. This question is itself a provocative controversy. But in any event, these traditions, along with the ascendance of Anglo-American rights tradition at the time goes some way towards explaining the highly judicialized response at Nuremberg. Thus, the criminal and the constitutional responses share a common theory of rights that related to the particular political and historical circumstances of that time. Though characterized as universal, international human rights were conceptualized as traditional rights at law: that is, rights as norms backed by sanctions. It is this conceptualization that leads to the view of criminal law as a place for the normative construct of universal rights.

The trials at Nuremberg could be thought of as instantiations of a typically Anglo-American view of rights; a conception imposed by the Allies in the post-war period. This view has persisted and is dominant in human rights law today. Thus, the reigning view of this time is that a tremendous gap in rights enforcement derives from the model of post-war justice, of judicialized rights, of an all-powerful tribunal which would enforce these individual rights.

The understanding of "international" here mediates the concept of the universal and the particular. While traditional understandings of enforceable rights ordinarily correspond to the enforcement of criminal law within the nation state, nevertheless, the post-war international criminal tribunals suggest the possibilities of an international judicial system which nevertheless seeks to enforce a traditional understanding of judicial rights.

Thus, today, seen from the vantage point of history, it is clear that this view of the post-war proceedings has become the leading paradigm of human rights. The appropriate response to the abuse of human rights is considered to be legal, and punitive. We can see this in the entrenchment of the Nuremberg Tribunal in the proposed permanent international criminal court adopted in Rome.[11]

Let me continue the genealogy turning next to the beginnings of the limiting of the universal in the human rights model.

As a historical matter, it is with the Cold War that the shift is evident from suppositions of human rights as universal to the more particularized and differentiated understandings of human rights. In this context of the historical and political contingencies at the time, perhaps overdrawn distinctions developed between the civil, political, and economic and social rights that relate to the Cold War. All of these areas merit reconsideration today. Thus, the judicial view of rights would go a long way towards obscuring economic and social rights, despite that, according to the Universal Declaration, they were accorded equivalent treatment.

There was also a movement in the 1950s and 1960s towards domestic adjudications of human rights and there were some notable trials where these concepts of the crime against humanity were developed further, namely, the trials of Adolf Eichmann[12] and Klaus Barbie,[13] as well as World War II related trials conducted within Germany. These proceedings are noteworthy for their vivid limits on the understandings of universality, whether of restrictive principles on the basis of nationality, for example, of the nationality of the perpetrator, or nationality of the victim — Germany and Israel are examples of those — and in the more contemporary period, a challenge to the notion of the objective positive law citizenship status of the protected person in the meaning of crime against humanity.

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[11] *See* Rome Statute, *supra* note 6.

[12] *See* The Attorney General of the Government of Israel v. Eichman, Israel, Supreme Court 1962, 36 I.L.R. 277 (Sup. Ct. 1962).

[13] *See* Federation Nationale Des Deportes et Internes Resistants et Patriotes and Others v. Barbie, France, Court of Cassation (Criminal Chamber), 78 I.L.R. 125 (1988) (Court of Cassation, Criminal Chamber 1983-95).

There, the politics of difference conflict; the challenge to the politics of universalism becomes very clear in the trial of Klaus Barbie in France.[14]

Let me pursue this further for a minute. France had adopted the Nuremberg definition of crimes against humanity in its own criminal law, a domestic incorporation of the universal concepts.[15] In France, this change was brought home by the radical transformation of principles of jurisdiction to represent the universality in the offense. For the purposes of the crime against humanity, and only for that purpose, the ordinary time limits which would have applied in France even to the most heinous murder were lifted, allowing the trials to go forward, even though it was the late 1980s, for crimes committed during the World War II period.

Now, jurisdictional principles may be boring to much of the world, but not to lawyers. In this period of globalization of jurisdiction, these turn out to be fertile and expansive spaces for the normative construction of human rights norms. And so, the lifting of the traditional principles of jurisdiction signaled an attempt to de-politicize and underscored the universality aspects of the offense of the crime against humanity.

Nevertheless, it would prove difficult to limit politicization of these prosecutions of the Vichy regime,[16] even in contemporary France, and subsequent trials of that period continue to bear out that point. For these crimes were committed in a distinct political context, but adjudicated in yet another political context. This would become very clear in challenges to the court's substantive jurisdiction.

Despite features of normative universalism implied by these proceedings, a central challenge emerged in the substantive meaning of the crime against humanity as incorporated in French law, that is whether the court and the prosecution would go beyond the atrocities committed against the children

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[14] *See* Leila Sedat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation; From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L. L. 289, 359 (1994). (This article contains an excellent discussion of the role French jurisprudence has played in the evolution of the crimes against humanity).

[15] *See id.*

[16] *See id.*

of Isiea to include those offenses committed against the Resistance, i.e., arguably politically motivated crimes.[17]

When the French courts expanded their crime against humanity offense to include these crimes, it would look beyond objective definitions of the protected status of victims under the statutes, and turn to the principle of motive of the perpetrator. It did so despite challenges that the trials had become politicized. Nevertheless, it suggested the elaboration in the development of concepts of universality within international criminal law, and in particular as incorporated within domestic jurisdiction.

Now, today we are seeing this point fulfilled, the further globalization of international criminal justice, thus, for example, in the case of Pinochet among others relative to military juntas and in the Americas. Jurisdiction is being assumed on a global basis, but a sporadic one. Consider the meaning of these proceedings. The deracinated trials raised the tension of the universal and the particular. What is the normative message of criminal law, of the rule of law, in a bubble outside of the political controversy? Can trials of individuals respond to the systemic prosecutorial ideology perpetrated in the implicated countries? While such adjudications appear to send an international message of condemnation, they also raise profound political issues.

Let me move to the final developments, the normalization of the post-war model, both in the ad hoc tribunals at the Hague regarding the Balkans and Rwanda, and in the Rome Statute, and give you some sense of how international criminal law constructs have changed and how the legislation itself and the codifications have expanded to include and to mediate concepts of the universal and the particular.

At the Hague, at the ad hoc international criminal trials that are now ongoing, we can see the attempt to use criminal justice to respond to the so-called "ethnic conflict" in these areas. From its very inception, the Security Council's decision to establish the adhoc tribunal regarding the conflict in the Balkans was to bring about peace through trials. This attempt

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[17] *See id.*

to use rule of law to respond to ongoing conflict was truly work that the criminal law had not been used for before.

The theory of the role of international criminal justice was reflected in statements by the prosecution, that the idea was to break old cycles of "ethnic retribution" through the identification of individual responsibility. To that end, crimes against humanity would be prosecuted as widespread and systematic inhumane acts "perpetrated on any civilian population on an ethnic basis." Ethnic persecution would be prosecuted as genocide. So, in the current proceedings at the Hague, the ideas of universalism are extended beyond Nuremberg in a number of ways. Crimes against humanity are prosecuted beyond international armed conflict.

But the central point that these cases raise is whether the identification of individual accountability is up to the task of constructing a norm that can be responsive to ethnic persecution. The use of international trials, in my view, over-emphasizes the role of the individual and in doing so obscures the significance of policy.

In the way the International Tribunal for the former Yugoslavia has adjudicated these crimes, they appear to be profound, apolitical offenses against the international community — indeed, against humanity. In some regard, this is the criminal law's transformative goal, mediating the universal and the particular through principles emphasizing racial motive. The significance of motive is seen in the definitions of genocide and crimes against humanity in these cases. Both offenses connect individuals to group identities through persecutory policy. The Hague trials take note of ethnicity supposedly only to transcend it. Here we see the *sui generis* way that criminal trials attempt to mediate and to reconcile the universal and the particular.

But is the criminal law up to the task? This is debatable, particularly wherever trials emphasize and reenact ethno-conscious elements of persecution while eliding mechanisms of state policy.

Let me wrap up by turning now to the broader question of the aims and purposes of the use of trials and suggest that where societies are spurred by illiberal identity politics, such politics should be exposed for what they are, political construc-

tion. The question is whether criminal law is a good vehicle for this work.

If we turn finally to the entrenchment of the postwar model in the International Criminal Court and to the Rome Statute, we see further indication of the normative conflict regarding the purposes of international criminal justice. This is seen in the intended goals of these universalizing constructs and in the definition of the crime against humanity.

The Rome Statute makes evident the tension in the politics of universalism versus identity politics, or, the politics of the particular. The definition of crimes against humanity is affirmatively used to recognize injustice and the politics of difference.[18]

In fact, this was first seen in the NGO (non-governmental organization) debates over the statute in Rome. NGOs, particularly women's groups, were particularly interested in the representation of women and in the enhanced codification of sexual violence several places in the statute, including the crime against humanity, but also in other places, such as genocide. These deliberations led to expansion of the crime against humanity to include sexual slavery, rape, forced prostitution, forced pregnancy,[19] and persecution on a political, racial, national, ethnic, cultural, religious, or gender basis.[20] All are comprehended by the crime against humanity in the Rome Statute.

Moreover, apartheid and the addition of disappearances have been codified as crimes against humanity.[21] These recognitions of the crimes of the apartheid regime and the crimes committed by the military junta throughout Latin America as crimes against humanity offer eloquent equality symbols; symbols of equality in testimony to the massive political change of the recent period.

Nevertheless, these changes also raise profound questions about the role of international criminal justice and human rights in the contemporary moment. If, as Judith Shklar observed, the modern moment begins with a sense of recognition of human potential, rather than the wish for divine interven-

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[18] *See* Rome Statute, *supra* note 6, art. 7.

[19] *See* Rome Statute, *supra* note 6, art. 7(g).

[20] *See id.* art. 7(h).

[21] *See id.* arts. 7(i)-(j).

tion, then the post-modern moment lies in the self-consciousness of the limits of the process of identification of individual responsibility. Here we have a sense of the potential of international criminal law. The question now is what values to represent and what directions are we headed in?

How should atrocities be prosecuted? Is it most significant to accurately represent what happened, i.e. past wrongdoing, or, to transform? The goals are entirely different. And so, while criminal law is capable of underscoring what is universal in human rights, it also can underscore the politics of difference and emphasize offenses committed on a racial and gender basis.

In the contemporary moment, the purposes of the criminal law stand in fragile equipoise. The danger is that the legal remedy might somehow reaffirm the original construction, that an equivocal representation, this time by the state of an illiberal identity politics; without sufficient account of the pernicious ideology and policy that spur illiberal identity politics. This suggests to me that international criminal law may ultimately not be the best vehicle for reconciling these conflicts.

QUESTIONS AND COMMENTS

PROF. DUBINSKY:

Thank goodness. At the beginning, I thought we were going to have a united front here, but I have already seen the signs of considerable discord, which I hope your questions will probe.

Let me just give Professor Higgins, if she would like, a chance to respond on the issue of female genital cutting — or would you like me to go to questions?

PROF. HIGGINS:

Why don't we just go to questions? We only have a few minutes. I am sure people have comments.

PROF. DUBINSKY: Okay.

Q: The *Yoder* case was interesting because I think there was a dissent in it that said that since the individual was a child, he should have a right to go on outside of his society.[1] What are your feelings about that?

PROF. ROSENFELD:

I think that is an issue in the *Yoder* case. Justice Douglas said that nobody had asked the child. The child, I think, was fourteen, so he was no longer a child that could not reason.[2]

The *Yoder* case has many facets, and this one shows very well the conflict. On the one hand, the community's claim on the individual. To put it very strongly, the Amish could claim that, unless the state allowed them to take the child out, he would lose the traditions and would get assimilated into the larger society, which I take as a serious claim. I think that, except for Douglas, the rest of the Court just glossed all over this.

And then, there is the individual thing. We do not know what the child wants to do. And those are the most difficult

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[1] State of Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[2] *See id.*

questions because, to the extent that one does support collective rights — and I support collective rights; I think they are essential — the cultural integrity of a society cannot be preserved unless there is transmission to the children. But that is one of the greatest dilemmas: to what extent transmission; to what extent does the state have a right to demand some kind of inculcation of certain values, like tolerance, civic, decency, and so forth? That is one of the most difficult questions within this context.

PROF. TEITEL:

I just wanted to weigh in on FGM, since I was the only person on the panel who did not say anything about it. I just wanted to say that it is intriguing that the dilemma of the universalism and cultural relativism is overstated with respect to this question.

What is interesting about the two hypotheticals that Professor Waldron introduced — and this is just to build on his argument — is that the norms in both societies, both the so-called industrialized, more advanced societies and the norms of the other societies that we are critiquing, the norms are written on the bodies of women. There, you could say in a more virtual way — there are theorists that would not regard that as virtual — and another in another, more long-standing way.

That is very intriguing to me, because I think the women's movement should really move away from the dilemma and focus on, no matter in which normative construct, normative universe, these norms are written through the bodies of women and they end up being used this way.

PROF. HIGGINS:

I just wanted to say on this point that I think actually the women's movement on the international level has done a relatively better job than the human rights community generally in moving in the direction that Professor Teitel suggests; that is, to see this practice as a more complex one. I think it has become a kind of symbol that is focused on because of its utility as an example. We have all used it here.

But I think the emphasis now politically is on building coalitions to reexamine the practice, and particularly listening to

women within the culture. The parallel to *Yoder* here I think is interesting, because it tends to be a practice that is controlled by women and it is about inculcation of growth into the local community, and it is regarded by the women within the community as a practice that enables the women to develop into adult human beings and create families. Now, we can be very critical of the practice from our own perspective, but it is important to understand its local cultural significance.

When we respect the right of the Amish to take their children out of school and educate them — or home schooling, for example, to educate children the way that families see fit — a right that is cited in the Universal Declaration is a qualification of the right to education. We also can see parallels with that and female genital surgery, I think.

PROF. DUBINSKY: Professor Sohn?

Q [Prof. Sohn]:

One of my students from Southeast Asia brought me a problem with regard to her thesis that she was writing. It was that in Southeast Asia children are trained to believe that they have obligations to their parents because the parents took care of them when they were born and while they were growing up. Because of that belief, if the parents are very poor and their economic situation is very bad, the only way they can really better themselves, better the family, is to sell their children to somebody who will find them work, especially in Thailand, where then the children are being used in Southeast Asia to produce labor in factories, eight hours a day, seven days a week, to produce cheap goods that they can sell then to us. And then, we say this is improper with regard to these human rights, et cetera.

They say, "Yes, but this is necessary for us to help our parents. Even though we know that these are very undesirable procedures in Thailand, they raised us the best that they could. Now they are in trouble, we have to help them." What would you answer to that?

PROF. DUBINSKY:

That's a nice softball question. Does anybody want to take that one on?

PROF. HIGGINS: Why is everyone looking at me?

Well, I do not really have an answer to the question, although I have an observation. I think that this question about the education of children and inculcation of these values of caring for one's parents, even at the extreme sacrifice that you describe, addresses a question that I have been interested in, and that is the issue of choice and agency of the individual.

When we are thinking about human rights and respecting human rights, to what extent do we honor the expressed beliefs and preferences of an individual, such as the child that you describe, in expressing obligation to one's parents? At what point do we ascribe false consciousness, for example, to that individual and take it upon ourselves to advocate re-education in the international human rights values?

This is a question that I think comes up all the time in debates about relativism. It is not one that I have a good answer to.

PROF. WALDRON:

I think the problem is a perplexing one, isn't it? One of the ways in which it perplexes us is that we are not sure whether we gave enough attention to this sort of belief and this sort of circumstance when we first formulated our human rights standards about child labor.

So, again, I would want to suggest that what we must do is revisit, not overthrow, the original prohibition on child labor. Given that we are, in general, uncertain about how to raise kids — look at the chaos around you — given that we are uncertain about how to raise children, we should ask ourselves, "Are we sure" — for example, with reference to cases like this, and with reference to this sort of relation between parents and children and this sort of nexus of obligation between children and their parents — "are we sure that we would want to have a single, hard-and-fast child labor standard, or does the sort of unique relativity of this situation force us to move away from that?"

PROF. SOHN:

There is a supplement to this case. But then she says to me, "Yes, but I have been reading Dickens, and he points out that the British established the . . . industry with children being brought from the villages to work in the private factories, you might say. At that time in England it was considered very proper and necessary for children at that time. Then she said, "If Dickens was writing about those things and we are seeing movies about that, and now you are saying to us that this is prohibited."

PROF. ROSENFELD:

There is no easy answer to that. But I want to make a couple of points in reference to your comment. One of them is I think that — although we do not have time to probe this, it would be interesting — I have emphasized the word "particularism" rather than "relativism" for philosophical reasons I will not go into here. But your comment suggests two things to me. On the one hand, there are problems which are general human rights problems, that the larger issue is one of reconciling a certain degree of dignity, autonomy, on the one hand, and a minimum of welfare for all human beings. So part of the answer to your question is some kind of reordering of the economic, particularly as we are moving to a globalized world, in terms of giving minimum welfare rights around the world. That would be one way in which this could be done.

And it would seem to me very difficult to believe that if this person and her family had enough means, that they would approve of the sacrifice, Dickens or no Dickens. That is the one hand.

On the other hand, the other observation this elicits is that — and this is not an issue of relativism — it is an issue that moral dilemmas or human right dilemmas change from context to context, depending on the circumstances, the conditions, and the possibilities. One of the ironies of all this is that if we had a very strong boycott, for example, of goods produced by children in that situation, we are hurting them, although I understand our moral sentiment. We are hurting, in the short run at least, them more than we are helping them. So we have to think in

terms of contextualizing our thinking in terms of particular circumstances that vary enormously from country to country.

Q [Prof. Flaherty]:

I have a two-fold observation which prompts a couple of questions.

One lesson I am inferring from the collective panel discussion is that it is all about universalism, and it is all about universalism in two senses, or at least on two levels.

The first level is prompted by my colleague, Professor Higgins's remarks, which is that what you see in the Universal Declaration is, it is not particularism or relativism versus universalism per se. Rather, you have one view which takes as the universal claim the sanctity of the individual, and is somewhat thicker than that because there is an array of rights attached to the individual.

What is called "relativism" is actually premised on a universalist claim itself, which is that the relevant unit is the culture, and it is a bitter claim because it seems to be mostly an anti-discrimination principle based on cultures. But those are the two universalist claims. It is true worldwide that you should not discriminate against cultural practices because the culture is the relevant unit.

Well, then, what it becomes a matter of is trying to evaluate the basis of those two universalistic claims. I think that Jeremy Waldron in his remarks has presented a great challenge to the universalistic nature of the relativist's claim for a number of reasons, which comports with my own inclinations.

However, to the extent that that universalist relativist claim — in other words, the claim that it is cultures that should be respected throughout the world — is valid, doesn't that at least counsel — and I guess this is directed to Jeremy Waldron — a sensitivity in application on relativist grounds of the sort that Professor Higgins and Professor Rosenfeld counsel?

A second competition between universalist values is the one that Professor Waldron actually counsels us to concentrate on, which is that various cultures are making different universalist claims on various things and that we should evaluate them on that level.

I guess my question with regard to that, and again, I think it is primarily directed at Professor Waldron is: don't current practices in human rights actually comport with what you are saying, because when the world community gets together and draws up treaties, it is usually through international conferences where, more and more over time — maybe not thirty years ago, but certainly over time more now — different cultural values are mooted, different claims are put forth, there is a lot of discourse and discussion, there is ultimate agreement, and then various treaties are opened for signature? So I guess my second question is: don't current human rights practices actually comport with the prescription that you are offering us to take up?

PROF. WALDRON:

Yes. On the second point I think you are right, inasmuch as any diplomatic —

QUESTIONER [PROF. FLAHERTY]: With all its flaws.

PROF. WALDRON:

Yes, could possibly do that. So my remarks are mainly addressed, as always, to my disgusting fellow philosophers, whose practice generally does tend to be to come up with whatever has emerged in the last week or two from the debate about John Rawls to apply that to the rest of the world; and then, when it is challenged, they dismiss the challenge as relativism. I think there is a very honorable openness to discourse in the diplomatic human rights community in what I call, with only slight irony, the human rights industry. I think you are right.

On the first point about even if different cultural traditions have to confront one another, isn't there some desirability of a certain degree of sensitivity among them, I guess that is right. There are a couple of points.

This issue was raised in the debate about Rushdie's *Satanic Verses*, where people wanted to say, "Look, we all know he had to come to terms with his heritage as a Moslem born in India, a product of both Kipling and the Mavarata and so on, but did he really have to do it so offensively? Couldn't he have done it sensitively?"

Two things always seem to me to be important to notice there, apart from conceding that there is something to the point. Conceptions of sensitivity are themselves culturally supported and contestable. So on some accounts, for example, it is a blasphemous insult for a woman to discuss theology with a man.

On the other hand, the matters that are being addressed when cultures and religions confront one another are usually very high-stakes matters, matters of life and death, or beyond life and death. There, you do not want to limit in advance the style of discussion to the boring procedures of a Midwestern Rotary Society or anything like that. You want to allow people to use irony, or tell stories like the story of Job, or to tell dreams backward, or whatever, just because these are issues that we are more or less inarticulate about.

But with that in mind, what is generally shoved under the principle of political correctness, which is not going needlessly out of your way to offend or insult others, I agree with you on that.

PROF. DUBINSKY:

I just wanted to add about your second point, whether or not our current international human rights follows what Professor Waldron mentioned, my main thought on that is it is surprising how few human rights instruments are self-implementing, where there is not a mediation function. So we can all have 100 or 150 people agree around a table and so forth, but what is actually going to happen in getting this implemented is often just a very, very different setting, so it is hard to say what exactly was agreed upon.

PROF. HIGGINS:

I also wanted to add one point about that, the issue of whether human practice comports with this idea of competing universalist claims. I think it is important not to leave that idea as though there is some kind of agreed upon fair procedural practice that then leads to documents that fairly represent the various cultural universalist claims around the globe.

I think that it is at least important to note that certain kinds of cultural claims are hegemonic and others are always

then seen as cultural dissents. That is why we label them, sort of carelessly I think, claims from culture rather than competing universalist claims. They are viewed that way, but they are viewed that way from our perspective.

PROF. DUBINSKY: We have time for one more question.

Q:

Thank you. I was wondering at which panel to bring this up. I belong to that oppressed group of homosexuals. The first time I ever actually read this Declaration, I was quite surprised by the contradictions inherent within it as far as homosexuality is concerned and gay rights. You can almost look at this as a blueprint for discrimination against gays and their rights.

I am talking, for example, about Article 16, where it states: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry . . . ." As anybody who has been involved in the gay rights struggle knows, the right to marry is one of the intrinsic human rights that we are trying to gain for ourselves as human beings.

I just wonder if anyone would address the fact that — I agree with Professor Waldron that this is from the other perspective very much a document that is not universal in its claims, from the gay perspective certainly, and it is almost a slap in the face. Having read it now, I have a very different opinion about the claims of universal human rights.

PROF. WALDRON:

I think I agree with you that certainly whatever debates took place about that right-to-marry clause in the Universal Declaration, I think we can safely say, even with respect to the comments made about the favorable view of international processes that were made before, probably the claims that you mentioned were not even canvassed or raised or considered or discussed. That is a fine example.

However, you come down on the issue of whether marriage would be transformed by this reform. We cannot say that there is a universal human rights consensus, on the one hand, which is to be implemented as a universal one and then there are all these particularist challenges to it. These challenges are chal-

lenges to its universality and challenges to the validity of the universal settlement.

I think what this also shows, which probably is a good thing about human rights law, is that human rights law has to be seen as a work in progress. That is, it cannot be that in 1948 we were uniquely in a position to be able to survey every form of oppression known to man and, thank God, we can now put it down in a document.

And probably, I think, one of the things that we ought to remember at this fiftieth anniversary is that this is something that we have to keep vigilantly working on, while at the same time not always throwing it into peril so that it is always up for renegotiation. That is a very delicate balance.

But I think your general point is absolutely right, that there are considerations there, no matter where they came from or who raised them, that ought to have been considered or that ought to be considered now in making what we can of that particular provision.

PROF. ROSENFELD:

If I may add something, which goes — I think, philosophically, I fully agree — but if I could put on my hat as a lawyer now, I agree with you that if we look at the intent of the founders, you put your finger on it. But given that, at least with respect to the Universal Declaration, one need not be an originalist.

It says, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." I do not see there any prohibition against same-sex marriage. It depends on your conception of the family. It protects the family and it protects marriage of men and women who reach a certain age. It does not say that it has to be a man to a woman or a woman to a man.

So if I were arguing a case with this provision, I think that I could make a very good claim that in today's world it ought to be interpreted as allowing people of the same sex to unite in what can be called a marriage and to found a family if they wish to.

QUESTIONER:

Then they would need to add the word "gender" in there to "race, nationality or religion."

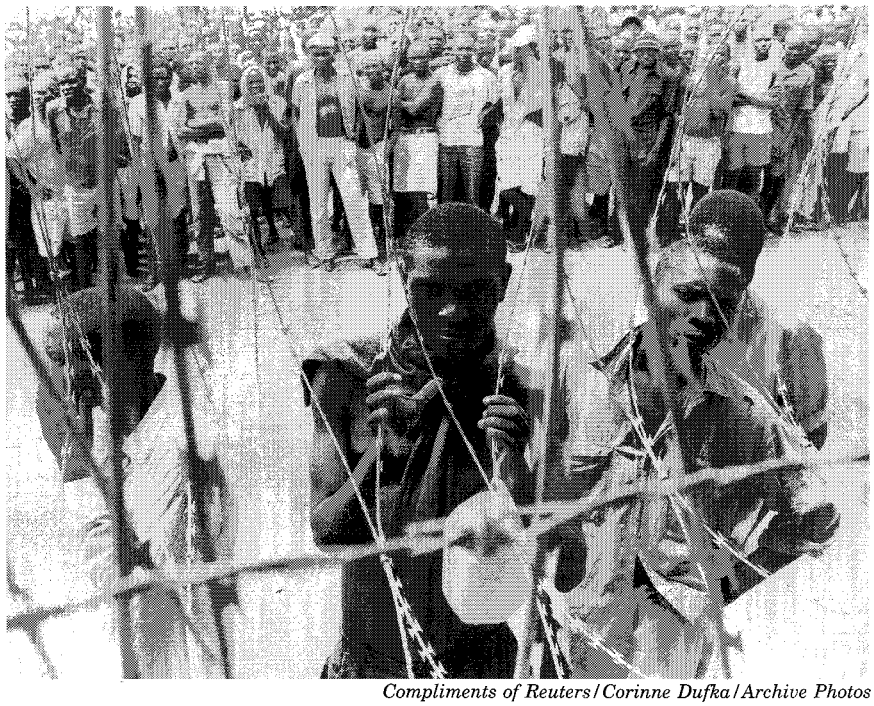
PROF. TEITEL:

On just that point, I think it is safe to say that the Declaration, if it is regarded as a constitution — there have been so many subsequent conventions in the international legal realm that have added gender. Certainly with respect to crimes against humanity, gender is always added. In fact, Human Rights Watch has done a lot of work, particularly now in East Europe and Romania, regarding the persecution on a gender basis of homosexuals.

So it goes on, and certainly at this point all of the conventions in the last, I would say, ten years, have added gender.

PROF. DUBINSKY:

Out of respect for our next panel, I think we probably have to cut it off there. I want to thank all the panelists and hope that will not be the end of the debate.



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Prisoners at the Gikondo Prison wait behind barbed wire for their turn to visit the local prison doctor, September 22. Although the International War Crimes Tribunal for Rwanda is scheduled to begin tomorrow in Tanzania, the judicial process for the some 80,000 prisoners being held in Rwandas' jails is moving slowly with no concrete plans for trials.