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The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights

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In this lecture I argue that modern bioethics was born at the Nuremberg Doctors' Trial, a health law trial that produced one of the first major human rights documents: the Nuremberg Code. Accepting this conclusion has significant consequences for contemporary American bioethics generally, and specifically in the context of our continuing global war on terror in which the United States uses physicians to help in interrogations, torture, and force-feeding hunger strikers.

The primary force shaping the agenda, development, and current state of American bioethics has not been either medicine or philosophy, but law, best described as health law. Like bioethics, health law is an applied field—in this case, law applied to medicine, biotechnology, and public health. Often the legal issues are raised in the context of a constitutional dispute, as in public debates about abortion, quarantine, the right to refuse treatment, and physician-assisted suicide. Other times health law involves the more routine application of common law principles to new technologies or techniques, as in medical malpractice litigation. Still other times it is in the form of a debate over the wisdom or effectiveness of statutes and regulations, as in human experimentation, drug safety, patient safety, and medical practice standards.

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American bioethics has had a major positive impact on the way medicine is currently practiced in the United States, especially in the areas of dying patients' care, including advance directives (living wills and health care proxies) and ethics committees, and the establishment of rules governing medical research, including federal regulations to protect research subjects and establish institutional review boards ("IRBs"). American bioethics has probably exhausted what it can usefully accomplish in these limited spheres. In the only other major areas of bioethics work, the related fields of abortion, embryo research, and cloning, bioethics has had no real impact in debates that have been dominated by religion. Given this, I think it is fair to conclude that American bioethics is unlikely to have a real-world future without a significant re-orientation of its focus and direction. I suggest that the most useful reformulation involves recognition and engagement with two interrelated forces reshaping the world and simultaneously providing new frameworks for ethical analysis and action—globalization and public health. Most relevant for American bioethics is that globalization brings with it a new focus on international human rights law and its aspirations, as articulated in the Universal Declaration of Human Rights.

I. NUREMBERG AND BIOETHICS

The boundaries between bioethics, health law, and human rights are permeable, and border crossings, including crossings by blind practitioners, are common. Two working hypotheses form the intellectual framework of this article. First, we can more effectively address the major health issues of our day if we harmonize all three disciplines. Second, American bioethics can be reborn as a global force by accepting that its roots lie in the 1946–1947 Nuremberg Doctors' Trial and by actively engaging in a health and human rights agenda. That these three disciplines have often viewed each other with suspicion or simple ignorance tells us only about the past. They are most constructively viewed as integral, symbiotic parts of an organic whole.

Both American bioethics and international human rights were born of World War II, the Holocaust, and the Nuremberg tribunals. While the Doctors' Trial was only one of thirteen

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trials at Nuremberg,¹ I believe it is accurate to conclude that the trial marked the birth of American bioethics.² This was closely wedded to the emergence of international human rights at Nuremberg. The International Military Tribunal at Nuremberg conducted the main trial over which judges from the four Allied powers presided.³ This War Crimes Trial contributed to the articulation of the Nuremberg principles—that there are such things as war crimes and crimes against humanity; that individuals can be held criminally responsible for committing them; and that “I was just obeying orders” is no excuse.⁴ These principles serve as a basis for international criminal law. The International Military Tribunal’s War Crimes Trial was followed by twelve subsequent trials, including the Doctors’ Trial; each of these was presided over solely by American judges.⁵

At the Doctors’ Trial, twenty-three physicians and scientists were prosecuted for murderous and torturous experiments conducted in the Nazi concentration camps.⁶ The most infamous of these were the high-altitude experiments and the freezing experiments, both of which resulted in the planned death of the research subjects. Both of these experiments were conducted with the rationale that the results would help German pilots survive, thus making the experiments necessary for the survival of German society.⁷ The judges, however,

1. Evelyne Shuster, *Fifty Years Later: The Significance of the Nuremberg Code*, 337 NEW ENG. J. MED. 1436, 1437 (1997).

2. *Cf. id.* at 1439–40 (describing the significance of Nuremberg to medical ethics and human rights). See generally HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 56–135 (2d ed. 2000) (deeming events prior to Nuremberg as “background” to the human rights movement).

3. Shuster, *supra* note 1, at 1437.

4. Robert F. Drinan, *The Nuremberg Principles in International Law*, in THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 174, 175 (George J. Annas & Michael A. Grodin eds., 1992).

5. Shuster, *supra* note 1, at 1437.

6. *Id.*

7. See Telford Taylor, *Opening Statement of the Prosecution December 9, 1946*, in THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION, *supra* note 4, at 67, 71–75 (describing the high-altitude and freezing experiments); see, e.g., Arthur L. Caplan, *How Did Medicine Go So Wrong?*, in WHEN MEDICINE WENT MAD: BIOETHICS AND THE HOLOCAUST 53, 71–77 (Arthur L. Caplan ed., 1992); see also Jonathan D. Moreno, *Bioethics and the National Security State*, 32 J.L. MED. & ETHICS 198 (2004) (describing the long relationship between national security and

rejected the defense that the experiments were necessary and acceptable in wartime. In their final judgment condemning the experiments and most of the defendants, seven of whom were hanged, the Doctor's Trial Court articulated what is now known as the Nuremberg Code.⁸ This ten-point code governing human experimentation was based on what the American judges had heard at trial, including the arguments of American prosecutors and the American physicians who served in the roles of consultant (Leo Alexander) and expert witness (Andrew Ivy) for the prosecution.⁹

Why did the Americans try the doctors and scientists first at Nuremberg? Murder and torture are criminal no matter who commits these acts, but it was seen as especially horrible to have educated professionals, who should have been dedicated to promoting health, alleviating suffering, and protecting life, become the active instruments of torture and death.¹⁰ Author, professor, and political activist Elie Wiesel speaks for all of us when he asks, "How is it possible? How was it possible?"¹¹ How could physicians actively and enthusiastically treat other human beings as, in the words of the prosecutor, General Telford Taylor, "less than beasts?"¹²

Reaching the conclusion that American bioethics was born at the Nuremberg Doctors' trial evokes T.S. Eliot's lines from *Little Gidding*:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.¹³

It is coincidental, but fitting nonetheless, that T.S. Eliot

bioethics).

8. Michael A. Grodin et al., *Medicine and Human Rights: A Proposal for International Action*, 23 HASTINGS CTR. REP. 8, 8-9 (1993).

9. For a history of Leo Alexander and Andrew Ivy, see Shuster, *supra* note 1, at 1437-39. See generally ULF SCHMIDT, JUSTICE AT NUREMBERG: LEO ALEXANDER AND THE NAZI DOCTORS' TRIAL (2004).

10. See Edmond Cahn, *The Lawyer as Scientist and Scoundrel: Reflections on Francis Bacon's Quadricentennial*, 36 N.Y.U. L. REV. 1, 9-12 (1961) (discussing moral limits and doctors' roles in human experimentation).

11. Elie Wiesel, *Foreword* to THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION, *supra* note 4, at vii, ix.

12. Shuster, *supra* note 1, at 1437.

13. T.S. ELIOT, *Little Gidding*, in FOUR QUARTETS 39, 48 (Harcourt 1971) (1944).

composed these lines during World War II when he was a night fire-watcher during the fire bombings of London. World War II was the crucible in which both human rights and bioethics were forged, and they have been related by blood ever since. As I have already suggested, recognizing and nourishing this birth relationship will permit American bioethics to break free from its focus on, if not obsession with, the doctor-patient relationship and medical technology and broaden its perspective to include global, population-based issues. It will allow American bioethics to cross our own border to become a global force for health and human rights—not as an imperialistic project, but learning from and working with other cultures, countries, and activists. It may also help us answer another question Professor Wiesel posed after learning of contemporary torture at Abu Ghraib and Guantanamo Bay: why the “shameful torture to which Muslim prisoners were subjected by American soldiers . . . [has not] been condemned by legal professionals and military doctors alike?”¹⁴

II. NAZI DOCTORS AND AMERICAN BIOETHICS

Although the World War II origin of American bioethics is easier to see at the beginning of the twenty-first century, mainstream bioethics historians, while acknowledging the Nuremberg Doctors' Trial and the Nuremberg Code as important historical events, continue to prefer seeing American bioethics as a 1960s and 1970s response to medical paternalism.¹⁵ Nuremberg is seen as an important event, but one that had no immediate impact on medical ethics. One of the main reasons for this has been an active program to bury the Nazi doctor past and to distance American medicine and bioethics from Nazi medicine for fear that any association with the Nazi experience would somehow tarnish it.¹⁶ The best known example is probably Henry Beecher, an anesthesiologist sometimes credited with getting American bioethics started

14. Elie Wiesel, *Without Conscience*, 352 *NEW ENG. J. MED.* 1511, 1513 (2005).

15. See, e.g., ALBERT R. JONSEN, *THE BIRTH OF BIOETHICS* 134 (1998) (noting that the Nuremberg Code was a “beginning that would become bioethics” but focusing on developments in the 1960s); cf. DAVID J. ROTHMAN, *STRANGERS AT THE BEDSIDE* 62 (Walter de Gruyter 2d ed., 2003) (1991) (arguing that the Nuremberg Code “might have served as a model” for American bioethics, but ultimately dating the beginning of modern bioethics to the 1960s).

16. Caplan, *supra* note 7, at 78–79.

with his 1966 article in the *New England Journal of Medicine*, which catalogued unethical experiments conducted at major United States' research institutions long after the promulgation of the Nuremberg Code.¹⁷

Beecher was a leader in drafting the World Medical Association's Helsinki Declaration on human research.¹⁸ The World Medical Association was an organization formed in London at the end of 1946 just as the Doctors' Trial was getting under way. Many saw its Helsinki Declaration as a way to "save" medical research from becoming dominated by the "overly rigid" Nuremberg Code.¹⁹ Nuremberg was considered overly rigid because of what psychiatrist Jay Katz has consistently highlighted and praised about it—namely, its "uncompromising language to protect the inviolability of subjects of research."²⁰ By valuing the liberty and welfare of research subjects above the promise of medical progress, the Nuremberg judges sought to place the interests of individual humans above the interests of society in medical progress. But medical progress has consistently won out over the consent principle in the real world.²¹ For example, the 1979 Belmont

17. See Henry K. Beecher, *Ethics and Clinical Research*, 274 NEW ENG. J. MED. 1354, 1354–60 (1966).

18. World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects, <http://ohsr.od.nih.gov/guidelines/helsinki.html> (last visited Oct. 28, 2008).

19. See Sir William Refshauge, *The Place for International Standards in Conducting Research on Humans*, 55 BULL. OF THE WORLD HEALTH ORG. (Supp. 2) 133, 137 (1977) ("The Nuremberg Code presents a rigid set of legalistic demands The Declaration of Helsinki, on the other hand, presents a series of guides. It is an ethical as opposed to a legalistic document, and is thus a more broadly useful instrument than the one formulated at Nuremberg.") (quoting Henry K. Beecher); see also U.S. ADVISORY COMM. ON HUMAN RADIATION EXPERIMENTS, HUMAN RADIATION EXPERIMENTS 85–92 (1996) (describing the disconnect between the Nuremberg Code and American researchers and the development of the more flexible Helsinki Declaration).

20. Jay Katz, *Human Sacrifice and Human Experimentation: Reflections at Nuremberg*, in 5 YALE LAW SCHOOL OCCASIONAL PAPERS (1996), available at <http://lsr.nellco.org/yale/ylosop/papers/5>.

21. See Renee Fox, *Medical Humanitarianism and Human Rights: Reflections on Doctors Without Borders and Doctors of the World*, reprinted in HEALTH AND HUMAN RIGHTS: A READER 417, 433 (Jonathan M. Mann et al. eds., Routledge 1999) (suggesting that the concepts of human rights and social justice have had difficulty gaining universal support in the West); see also Tom L. Beauchamp, *Does Ethical Theory Have a Future in Bioethics?*, 32 J.L. MED. & ETHICS 209, 211 (2004) (calling Fox's hypothesis "surprisingly influential"). For further criticism of America's emphasis on progress over principle, see

Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, probably the most cited government-sponsored statement of research ethics, begins with an opening paragraph about the Nuremberg Code but then quickly asserts that its rules “often are inadequate to cover complex situations,” like research on children and the mentally disabled.²²

Nuremberg was also on the minds of Daniel Callahan and the founders of The Hastings Center, one of the two earliest American think-tanks on bioethics. They held a major program on Nuremberg’s implications for bioethics.²³ But, as described by Arthur Caplan—who himself sponsored a similar program a decade later, in 1989 at the University of Minnesota—there were many reasons for American bioethics to suppress its birth at Nuremberg, most notably the sheer unprecedented scale of immorality of the Nazi doctors and the potential guilt by association, especially in the research enterprise.²⁴ But suppression did not prevent Caplan from concluding that “bioethics was born from the ashes of the Holocaust.”²⁵

The source of American bioethics can also be read in the biographies of many of the founders of American bioethics and its current leaders.²⁶ The history of American bioethics is

Renee C. Fox & Judith P. Swazey, *Medical Morality is Not Bioethics—Medical Ethics in China and the United States*, 27 *PERSP. IN BIOLOGY & MED.* 336, 337–38 (1984) (positing that “bioethics deals in public spheres and in more private domains with nothing less than beliefs, values, and norms that are basic to our society, its cultural tradition, and its collective conscience”); see also Renee C. Fox & Judith P. Swazey, *Leaving the Field*, 22 *HASTINGS CTR. REP.* 9, 15 (1992) (arguing that medical emphasis on “rebuilding people through organ replacement” has displaced bioethics’ focus from human pain and suffering).

22. NAT’L COMM’N FOR THE PROTECT. OF HUM. SUBJECTS OF BIOMED. & BEHAV. RES., *THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH* (1979), available at http://www.emerson.edu/graduate_studies/upload/belmontreport.pdf.

23. Daniel Callahan et al., *Special Supplement: Biomedical Ethics in the Shadow of Nazism*, 6 *HASTINGS CTR. REP.* 1, 1–19 (1976).

24. Caplan, *supra* note 7, at 78–79.

25. George J. Annas, *American Bioethics and Human Rights: The End of All Our Exploring*, 32 *J.L. MED. & ETHICS* 658, 659 (2004) (quoting Arthur Caplan).

26. A rewriting of the intellectual history of American bioethics is beyond the scope of this lecture, but my guess is that virtually anywhere one begins to dig in American bioethics, one will end with World War II. The best known examples are from two of the field’s intellectual founders: Jay Katz and Hans Jonas. Both were born in Germany and had family members killed in the Holocaust, and their bioethics-related writings grew out of their reflections on

rooted in the Nazi concentration camps in another way as well. Historians are correct to see American bioethics in the late 1960s and early 1970s as fundamentally a reaction to powerful new medical technologies in the hands of medical paternalists who disregarded the wishes of their patients. The major strategy to combat this unaccountable power was to empower patients with the ethical and legal doctrine of informed consent (sometimes called “autonomy” in the ethics literature and put under the broader rubric of “respect for persons”). While this is perfectly reasonable, it is unreasonable to want to distance the bioethics field so much from its origins, thereby missing the fact that Nazi physicians who performed experiments in the concentration camps did so in an impersonal, industrial manner on people they saw as subhuman, and that they were unaccountable in the exercise of their power over their subjects. The first response of the American judges to the horror of the Nazi doctors was to articulate, in the first precept of the Nuremberg Code, the doctrine of informed consent.²⁷ The modern doctrine of informed consent was not born either of U.S. health law in 1972, or of American bioethics shortly thereafter, but at Nuremberg in 1947.

A. THE NUREMBERG CODE

The judges at the Doctors’ Trial prefaced their enunciation

the war and the concentration camps. Jay Katz, for example, published what is still the leading text on human experimentation in 1972, and the Nuremberg Doctors’ Trial was central to this collection of primary sources. His star student and assistant in this project, Alex Capron, went on to be a leader in American bioethics himself, and I do not think it is an accident that he is currently the ethicist for one of the major “health and human rights” organizations in the world, the World Health Organization. Jay Katz was a member of two major U.S. bioethics panels that examined scandals: the Tuskegee Study Panel in 1972, and the President’s Advisory Council of Human Radiation Experiments from 1994–95. The Nuremberg Code was the centerpiece of the latter report—although attempts to distance it from bioethics continued. Hans Jonas was, of course, extremely prolific. His bioethics was also much broader than just medicine and included the entire biosphere. Nonetheless, it was grounded in the Holocaust and the dehumanization of Auschwitz, where his mother was murdered. His star pupil, Leon Kass, was the head of America’s bioethics council from late 2001 to October 2005.

27. *The Nuremberg Code*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, No. 10, at 182 (1949), *available at* http://www.ushmm.org/research/doctors/Nuremberg_Code.htm.

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of the Code as follows:

The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts:

1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that

determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.²⁸

III. HEALTH LAW, BIOETHICS, AND HUMAN RIGHTS

The American judges at Nuremberg were comfortable crossing borders, especially the border between American medical ethics (what we now know as bioethics) and international human rights law. Informed consent doctrine is rooted in that body of law.

As in any organic whole, the boundaries between the interrelated fields of health law, bioethics, and human rights are easily crossed. The collapsing of other boundaries in human rights discourse suggests how a more integrative model might be built. In the brief history of human rights, for example, there have been three great divisions, all of which have been breached (although attempts to police these borders persist). These are the divisions between positive and negative rights, public and private actors, and state internal affairs and matters of universal concern.²⁹

The positive and negative rights distinction has

28. *Id.*

29. For the most comprehensive text on international human rights, and the one I rely on heavily in this conclusion, see Steiner & Alston, *supra* note 2.

increasingly been seen as a difference of degree rather than kind. This is because many of the so-called negative rights—such as the right to be left alone, the right to vote, freedom of speech, and the right to trial by jury—actually require positive government action, such as setting up a police and court system and making legal counsel available to the accused. Of course, in the arena of positive rights like the right to food, shelter, jobs, and health care, governments are required to expend more resources (many more than for “negative” rights) to fulfill these rights. But resources will have to be expended to fulfill both types of rights.

In the language of contemporary human rights, governments do not simply have the obligation to act or not to act, but rather have obligations regarding all rights to *respect* rights themselves, to *protect* citizens in the exercise of rights, and to *promote* and *fulfill* rights. Of course, not all governments can fulfill economic rights immediately because of financial constraints, and international law suggests that governments must work toward the “progressive realization” of these rights within the limits of their resources. Some governments may be so limited in their resources that they may require assistance from the world community, and the novel but powerful “right to development” speaks to the obligations of the world community to provide that assistance, as does the United Nation’s Millennium Declaration.³⁰

A similar analysis can be made of the distinction between private and public actors. Individuals cannot be free to commit crimes in the privacy of their homes; the law has jurisdiction in both the public and private sphere. International law has traditionally focused solely on the relationships between governments and between a government and its people. However, private actors, such as transnational corporations, have more recently been seen as having so many direct relationships with governments, who often act explicitly to protect the interests of such corporations, that they should be seen as a fit subject for international human rights. Similarly, although historically the boundary of a country protected it from interference with its “internal affairs,” the world today will not always stand by and watch as countries engage in massive human rights abuses; although it did fail to stop the abuses in Rwanda and continues to do so in the Sudan.

30. Millennium Declaration, G.A. Res. 55/2, U.N. DOC. A/RES/55/2 (Sept. 18, 2000).

Instead, the world may, as in South Africa, intervene to try to prevent major human rights abuses.

Entirely new entities, termed nongovernmental organizations (“NGOs”), have sprung up and become the leading forces for change in the world. A notable health-related example is *Médecins sans Frontières* (“MSF”), a humanitarian-human rights organization founded on the belief that human rights transcend national borders, and thus human rights workers should cross borders when necessary. As Renée Fox describes it, over the years the *le droit d’ingérence* (the right to interfere) has been displaced with an even more activist *le devoir d’ingérence* (the duty to interfere).³¹ This concept takes human rights to be universal and sees globalization (the crossing of national boundaries) as a potential force for good. MSF expands medical ethics to include physician action to protect human rights, blending these two fields and treating the law that protects government territorial boundaries as subordinate to the requirement of protecting human rights. In this regard, MSF can be seen as one of the first health-and-human-rights fruits of our human rights tree. Other notable physician NGOs that have taken the lead in adopting a human rights framework for their work include Physicians for Human Rights, Global Lawyers and Physicians, and perhaps most notably, the British Medical Association.³²

IV. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Globally, boundaries are being breached by ideas, communication systems, and economics, even as the world paradoxically splinters into more and more countries. Many contemporary challenges are daunting and discouraging—

31. Fox, *supra* note 21, at 420–21.

32. My colleague, Michael Grodin, and I followed up our conference on the fiftieth anniversary of the Nuremberg Code at the Holocaust Memorial Museum by founding our own physician NGO—but combining it with lawyers as well: Global Lawyers and Physicians. See Global Lawyers and Physicians Home Page, <http://www.glphr.org>. The basic concept behind this NGO is that the professions of law and medicine are both inherently transnational and that by working together they can be a much more powerful force for promoting human rights than either profession can be working by itself. See also PHR: About PHR: Mission and History: PHR’s Mission, <http://physiciansforhumanrights.org/about/mission.html>; BMA: Updates to Medical Ethics Today, <http://www.bma.org.uk/ap.nsf/Content/MET2007updates>.

especially those related to global terrorism, international research in genetic engineering and human cloning,³³ and provisions of basic health care to everyone. However, the Universal Declaration of Human Rights (UDHR)³⁴ provides the world with an agenda and a philosophy.³⁵ The centrality of the UDHR to bioethics is well recognized internationally, for example in the U.N. Educational, Scientific, and Cultural Organization's (UNESCO) new "Declaration on Bioethics and Human Rights."³⁶

33. See George J. Annas, Lori B. Andrews & Rosario M. Isasi, *Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations*, 28 AM. J. L. & MED. 151, 151–178 (2002).

34. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). The UDHR reads, in part, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* art. 5. "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." *Id.* art. 25(1). "Motherhood and childhood are entitled to special care and assistance . . ." *Id.* art. 25(2). "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." *Id.* art. 28.

35. The UDHR itself incorporates the Nuremberg principles and the Charter of the United Nations. Jonathan Mann has also suggested the existence of a human rights tree model, with the UDHR as a trunk. This model, however, does not incorporate either bioethics or health law: "The two major branches, the two major International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, emerge from and expand upon the trunk with further elaboration through many important treaties and declarations." Jonathan M. Mann, *Human Rights and AIDS*, in HEALTH AND HUMAN RIGHTS: A READER 216, 223 (Jonathan M. Mann et al. eds., Routledge 1999).

36. See U.N. Educ., Sci. & Cultural Council [UNESCO], Int'l Bioethics Comm., *Report of the IBC on the Possibility of Elaborating a Universal Instrument on Bioethics*, U.N. Doc. SHS/EST/02/CIB-9/5 (Jun. 13, 2003) (prepared by Giovanni Berlinguer & Leonardo De Castro). My initial view on the question of whether to draft a universal bioethics declaration was that the Universal Declaration of Human Rights already serves this purpose, and that we cannot do better. I continue to believe that it is more constructive to put international efforts into instruments aimed at specific bioethics problem areas, such as genetics. I agree, for example, with the spirit of the statement of former IBC chair, Ryuichi Ida of Japan, who noted of UNESCO's Universal Declaration on the Human Genome and Human Rights that it "has its place in the series of international instruments for the protection of human rights in the same way as the 1948 Universal Declaration of Human Rights, whose legal force is today universally recognized. The UNESCO Declaration represents an extension of human rights protection to the field of biological science." U.N. Educ., Sci. & Cultural Council [UNESCO], Proceedings of the Round Table of Ministers of Science, *Bioethics: International Implications*, 47,

As for international human rights law, the politics of the cold war prevented the provisions of the UDHR from being incorporated into a single treaty. Instead two separate treaties were drafted, one on civil and political rights (the International Covenant on Civil and Political Rights) mirroring the political philosophy of the United States, and the other on economic, social, and cultural rights (the International Covenant on Economic, Social, and Cultural Rights), mirroring the primary concerns of the Soviet Union. This separation was political and artificial, and it is now well-recognized that economic and social (positive) and civil and political (negative) rights are interconnected and interrelated, and that human beings need both to enable human flourishing. Less well-recognized is that it was also the Cold War that prevented, or at least slowed, the development of American bioethics that originated with the Nuremberg Code. Because of fear of the Soviet Union, the United States embraced practicality more than principle in performing research. This occurred especially in the area of radiation research, impermissible under the Nuremberg Code—thus requiring suppression or marginalization of the code—but also in recruiting Nazi scientists and physicians to continue their research in the United States under U.S.

49 (Oct. 22-23, 2001) (statement of Ryuichi Ida). On the other hand, to the extent that the drafters now seem to have adopted the UDHR as their touchstone and are attempting to craft a document that in essence combines bioethics and human rights, this effort can be useful and constructive. See generally *Reflections on the UNESCO Draft Declaration on Bioethics and Human Rights*, 5 DEVELOPING WORLD BIOETHICS 197 (2005) (debating the utility of a new document combining bioethics and human rights).

The appointment of Edmund Pellegrino to head the President's Bioethics Council in October 2005 is also a positive move in the direction of merging human rights and bioethics. Dr. Pellegrino, for example, has strongly endorsed the centrality of the UDHR to medical ethics in the context of revelations about how physicians were used to torture under the Iraq dictatorship:

[N]ational and international medical associations must examine more closely the implications of becoming instruments of anything other than the healing purposes for which the profession is ordained. . . . This issue will be as critical for democratic as for despotic regimes, and it must become a global issue if the United Nations' Universal Declaration of Human Rights is to maintain significance. With such powerful tools [as advances in biotechnology that could be used for torture] in hand, will the medical profession remain a moral enterprise even in the face of threatening emergencies?

Edmund D. Pellegrino, *Medical Ethics Suborned by Tyranny and War*, 291 JAMA 1505, 1506 (2004).

military auspices.

The world's one remaining superpower and empire builder, the United States, has yet to enthusiastically embrace the UDHR, even though it was drafted under the able direction of Eleanor Roosevelt.³⁷ Instead, the United States has turned itself into an object of fear and distrust around the world in the wake of its "preemptive war" in Iraq.³⁸ But the government's attempt to ignore the UDHR's precepts cannot ultimately prevail, and ignoring its political and civil precepts is fundamentally anti-American. The same can be said of CIA torture and force-feeding by the military physicians at Guantanamo Bay—and it is heartening that President-elect Barack Obama has vowed that he will close Guantanamo and issue strict rules prohibiting torture as two of his first acts as president.³⁹ Attempts to regain America's moral status as a proponent of human rights, and its legal status as a country that follows the rule of law, continue. For example, in late 2005 the U.S. Senate voted ninety to nine, over the objections of the President and his administration, to explicitly outlaw "cruel, inhuman or degrading treatment" of anyone in the custody or control of the U.S. government.⁴⁰ The chief sponsor of this legislation, Senator John McCain, began his floor speech on his amendment to the Department of Defense Appropriations bill by saying: "[L]et me first review the history. The Universal Declaration of Human Rights, adopted in 1948, states simply: 'No one shall be subjected to cruel, inhuman or degrading treatment or punishment.' The International Covenant on Civil and Political Rights, to which the United States is a signatory, states the same."⁴¹

Few Americans, I am sure, ever thought that their government would condone and practice torture and inhuman and degrading treatment of prisoners, let alone publicly justify torture as necessary for national security. Nonetheless, the

37. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 79–98 (2001) for an account of the origins of the UDHR.

38. For a defense of the Bush Doctrine see PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 429–51 (2008).

39. Interview by 60 Minutes with Barack Obama, President-Elect, United States of America (Nov. 16, 2008).

40. David Rogers, *Senate in 90-9 Vote Passes Bill Seeking Clearer Detainee Rules*, WALL ST. J., Oct. 6, 2005, at A12.

41. 151 CONG. REC. S11063 (daily ed. Oct. 5, 2005) (statement of Sen. McCain).

Bush administration's position on torture is consistent with a view of American pragmatism⁴² that says there are times when principles must be ignored to produce a result that is highly desired, and, when fighting evil (whether in war or in a war against disease and death), it is acceptable to use an inherently evil means. This justification for committing war crimes and crimes against humanity was, of course, rejected at Nuremberg by the United States.⁴³

McCain did not highlight the role and participation of physicians in torture and "aggressive interrogation" (neither has American bioethics had anything to say about either the war on terror or the role of physicians in it), but had he focused on physicians and medical ethics, he could have said even more about the Universal Declaration of Human Rights and the subsequent Covenant on Civil and Political Rights.⁴⁴ He could have noted that in adopting language for the 1958 Covenant, a treaty that the United States signed and which came into force in 1966, the Nuremberg Doctors' Trial was front and center on

42. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

43. Accepting the Nuremberg Doctors' Trial as the birth of American bioethics has consequences. Let me tentatively suggest four that require more attention: (1) American bioethics is real-world oriented, and it is reasonable for physicians and lawyers to determine the agenda and approach to bioethical issues, for the dominion of law over ethics in bioethics is as reasonable today as it was at Nuremberg; (2) American bioethics is an inherent part of the international human rights movement, and therefore should be actively involved in promoting the goals articulated in the Universal Declaration of Human Rights and subsequent treaties (this agenda includes "positive" rights, the most important of which is the right to health, and this should be a central priority of American bioethics); (3) American bioethics, like American health law, has a role in politics, and should engage in politics that supports basic human rights both domestically and globally; NGOs will therefore become increasingly central to bioethics-human rights work; (4) articulation of codes of conduct (like the Nuremberg Code) is necessary, but not sufficient; at least for extremes, international forums, like the International Criminal Court, in which doctors and lawyers can work together, as they did at Nuremberg, to hold ruthlessly unethical medical practitioners criminally accountable for their actions, are necessary. "Naming and shaming" is integral to human rights work, but the development of more important enforcement mechanisms is essential, if for no other reason than that some government officials have no shame.

44. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

the minds of the drafters. The drafters added a second sentence to the original text of Article 5 of the UDHR “in order to prevent the recurrence of atrocities such as those which had been committed in Nazi concentration camps during the Second World War.”⁴⁵ The two-sentence provision of Article 7 of the International Covenant on Civil and Political Rights reads in its entirety: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁴⁶

The drafting of the treaty on civil and political rights and specifically including the consent requirement for law medical and scientific experimentation on humans, of course, means that Nuremberg and its consent principle were taken very seriously by the international law community in the 1950s.

Commenting on his experiences with top Bush administration lawyers who signed or wrote memorandums justifying torture, Alberto Mora, General Counsel to the U.S. Navy from 2001 to 2006 said, “I wondered if they were even familiar with the Nuremberg trials—or with the laws of war, or with the Geneva [C]onventions.”⁴⁷ He was right to wonder. In retrospect, it appears that many of these lawyers did know about Nuremberg and the international laws of war, but simply did not care. Perhaps, their working hypothesis was that all that mattered was domestic law and that the United States had no obligation to follow the international law it had helped to establish. This is astonishing.

It does not take a high-power lawyer to understand that no individual country can unilaterally change international law. War crimes remain war crimes even if a country authorizes its agents to murder or torture. A “new kind of war” does not suspend the laws of war.⁴⁸ Winston Churchill made this point shortly after World War II when he was writing his memoirs, in which he describes what he calls “a terrible decision of policy adopted by Hitler” on June 14, 1941, the outset of Germany’s

45. *Article Seven, Draft Covenant on Civil and Political Rights, Adopted by the Third Committee of the General Assembly of the United Nations, 1958*, in CLINICAL INVESTIGATION IN MEDICINE: LEGAL, ETHICAL AND MORAL ASPECTS 162 (Irving Ladimer & Roger W. Newman, eds., 1963)

46. *Id.*

47. Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32, 41 (quoting Alberto Mora).

48. See generally MYER, *supra* note 42; Myer, *supra* note 40.

war with the Soviet Union.⁴⁹ Speaking to Generals Fanz Halder and Wilhelm Keitel, Hitler said this war was “an entirely new kind of war,” and thus the accepted international laws of war would not apply. In Halder’s words:

[T]he Fuhrer stated that the methods used in the war against the Russians would have to be different from those used in the war against the West He stated that since the Russians were not signatories of The Hague Convention [precursor to the Geneva Conventions] the treatment of their prisoners of war does not have to follow the Articles of the Convention.⁵⁰

The point is not that President Bush was acting like Hitler when he suspended the Geneva Conventions for the war on terror; the point is instead Alberto Mora’s point that the President and his advisors seemingly knew nothing of the history of World War II. They certainly would not have modeled their actions on Hitler, especially while declaring that they were acting like Churchill.⁵¹ Similarly, the persistent and prolonged force-feeding of hunger strikers at Guantanamo by strapping them into “restraint chairs” that are the functional equivalent of strait jackets can be viewed not as “saving lives” but as human experimentation without consent. Like the Nuremberg Doctors’ Trial, which was more about murder and torture than human experimentation, force-feeding at Guantanamo is more about torture and cruel treatment used for punishment than about human experimentation. Nonetheless, an argument can be made that using a medical device (the restraint chairs) for a new indication (breaking a mass hunger strike) could be considered a human experiment in that it had never been used for this purpose before, and the commanders (if not the physicians) were testing the hypothesis (to gain generalizable knowledge) that its use could successfully (effectively) and safely break a mass hunger strike. This view, which would likely seem reasonable to a reviewing court, and certainly to the judges at the Doctors’ Trial, seems not to have even occurred to the military medical personnel at Guantanamo.⁵²

It is, I think, the ability to see enemies as less than human

49. WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GRAND ALLIANCE* 329 (1950).

50. *Id.*

51. See George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 430 (2007).

52. See *id.* at 445–47.

that permits us to engage in inhuman acts without acknowledging that guilt, at least to ourselves. This was also the primary theory behind Nazi eugenics—that there were certain lives that were not worth living and that it was therefore justifiable to sterilize and ultimately euthanize those who fit this category. Applied to large segments of the population, eugenics has a fundamentally racist rationale. Because of the horrific example of the Nazis and the Holocaust it seems unlikely that concentration camp-based racist eugenics are likely to recur. Contemporary genetics, and genetic screening, seem much more benign. But the language is uncomfortably similar. An example is provided by perhaps the world's most famous biological scientist, James Watson.

V. EQUALITY AND GENOMICS AND THE RISK OF GENISM

Equality based on human dignity is at the core of a human rights approach to health. For example, a country's obligation to respect and protect the right to health requires governments to refrain from denying or limiting equal access to all persons and to ensuring equal access to health care.⁵³ The new genetics can be seen as scientific validation of human equality in that it demonstrates that we all share substantially identical genomes, but it can also be used to foster prejudice and discrimination and thus undercut the right to health.

This human tendency to create divisions may be illustrated by an incident in late 2007 when the co-discoverer of the structure of DNA, James Watson, scandalized the world by ignorantly telling a British newspaper, "I'm inherently gloomy about the prospect of Africa" because "all our social policies are based on the fact that their intelligence is the same as ours—whereas all the testing says not really."⁵⁴

Watson later apologized and acknowledged that there is no scientific evidence to support his statement about differences in intelligence among races.⁵⁵ *Nature* magazine editorialized that Watson's remarks were "rightly . . . deemed beyond the pale,"

53. See M. MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 204 (2003).

54. Charlotte Hunt-Grubbe, *The Elementary DNA of Dr. Watson*, *THE TIMES* (London), Oct. 14, 2007, at 24.

55. See Rajeev Syal, *Nobel Scientist Who Sparked Row Says Sorry—I Didn't Mean It*, *THE TIMES* (London), Oct. 19, 2007, at 19.

but also warned, “There will be important debates in the future as we gain a fuller understanding of the influence of genetics on human attributes and behavior. Crass comments by Nobel laureates undermine our very ability to debate such issues, and thus damage science itself.”⁵⁶

Our superficial perceptions of each other have often fostered racism in the past. Simply defined, racism is “the theory that distinctive human characteristics and abilities are determined by race.”⁵⁷ The hunt for genes, especially in groups identified by racial classifications, could lead to “genism” a term not yet officially recognized, but one I would define as “the theory that distinctive human characteristics and abilities are determined by genes.” This view assumes that individual differences are based on DNA sequence characteristics, with resulting discrimination as pernicious as racism. Watson’s ignorant remark was not one of an old-time racist, but of a new-style “genist.”

It is true that “we are all Africans under the skin.”⁵⁸ It is also true, however, that if we decide to search for genetic differences in the one-half of one percent of our DNA that is different, we will find them and use them against each other. As philosopher Eric Juengst wisely stated, “No matter how great the potential of population genomics to show our interconnections, if it begins by describing our differences it will inevitably produce scientific wedges to hammer into the social cracks that already divide us.”⁵⁹

Preventing genism from taking over where racism left off by substituting molecular differences for skin color differences will not be easy. Two actions, however, seem necessary. First, genetic privacy must be protected.⁶⁰ No one’s genes should be analyzed without express authorization, and, of course, no “genetic identity cards” should be permitted. Second,

56. Editorial, *Watson’s Folly*, 449 NATURE 948, 948 (2007); see also John Schwartz, *DNA Pioneer’s Genome Blurs Race Lines*, N.Y. TIMES, Dec. 12, 2007, at A24.

57. OXFORD ENGLISH DICTIONARY (2d ed. 1989).

58. *Interview with Spencer Wells*, REDIFF.COM, Nov. 27, 2002, <http://www.rediff.com/news/2002/nov/27inter.htm>.

59. George Annas, *Genism, Racism and the Prospect of Genetic Genocide*, in THE FUTURE OF VALUES: 21ST-CENTURY TALKS 286 (Jérôme Bindé ed., Brian Verity & John Corbett trans., 2004).

60. See George J. Annas, Patricia Roche & Robert Green, *GINA, Genism and Civil Rights*, 22 BIOETHICS ii (2008).

pseudoscientific projects that purport to identify genetic differences between “races” should be rejected.

VI. VISIONS OF THE FUTURE

The future that many American bioethicists, notably those on President Bush’s Council of Bioethics, continue to worry about is Aldous Huxley’s *Brave New World*⁶¹—a world in which humans would be commoditized and stratified and would give up all of their dignity and self-respect for security, recreational drugs, and sex. Huxley’s would be a world of humans reduced to animal status. Preventing this vision from becoming a reality is a reasonable goal. But exclusive concentration on a *Brave New World* vision and an embryo-centric view of ethics energized by anti-abortion sentiments is not so much about bioethics as biopolitics, specifically President Bush’s limitations on federal funding for human embryonic stem cell research to placate his Christian fundamentalist base. Bioethics is important in U.S. politics, much as morality is important in law-making. But when bioethics is used primarily to serve an ideological, domestic political agenda—rather than helping to develop a global ethic—it is of little use to anyone other than narrow interest groups.⁶²

Making bioethics the servant of domestic politics also narrows its focus such that it is incapable of responding to or affecting a changing world, one envisioned more accurately in George Orwell’s *Nineteen Eighty-Four*:⁶³ similar to a post-9/11 world dominated by military dictatorships kept in power by fear induced by “perpetual war,” debasement of language (doublespeak),⁶⁴ and constant rewriting of history. The Guantanamo Bay prison camp is emblematic of the United States’s *Nineteen Eighty-Four* syndrome, and the fact that bioethicists have had almost nothing to say about the role of

61. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1939).

62. Just as the Department of Defense under Robert Gates has repudiated many of the anti-human rights policies of Donald Rumsfeld, so the President’s Council on Bioethics under Ed Pellegrino has changed course, concentrating on defining concepts of “human dignity” instead of on the moral status of the human embryo.

63. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

64. The term “doublespeak” does not appear in *Nineteen Eighty-Four* but is a combination of the 1984 terms “newspeak” and “doublethink.” The term has come to mean any “language which pretends to communicate but really does not.” See William Lutz, *Notes Toward a Definition of Doublespeak*, in *BEYOND NINETEEN EIGHTY-FOUR* (1989).

physicians there in “aggressive interrogation,” force feeding (termed “assisted feeding” in doublespeak), and hunger striking demonstrates its real world limitations. What seems evident is that human rights activists are more likely to provide nourishment to the human rights tree than bioethics theorists or health law scholars. Nonetheless, having practitioners of these interrelated fields working together has the potential to radically increase their impact on the real world for the better. This is why rather than abandoning health law and bioethics for human rights, we recently renamed our department in the Boston University School of Public Health (formerly the Health Law Department) the Department of Health Law, Bioethics and Human Rights.

Salman Rushdie also had border crossings on his mind when he reflected on the meaning of 9/11 in his collection entitled *Step Across This Line*.⁶⁵ He ends his reflections by noting that “We are living, I believe, in a frontier time, one of the great hinge periods in human history, in which great changes are coming about at great speed.”⁶⁶ Among the positive changes he lists are the end of the Cold War, the advent of the Internet, and the completion of the Human Genome Project. Negative changes include a “new kind of war against new kinds of enemies fighting with terrible new weapons.”⁶⁷ The changes we will adopt are not preordained, and Rushdie quite properly notes that “the frontier both shapes our character and tests our mettle.”⁶⁸ He is also right to wonder, as we stand on this frontier, whether we will regress into barbarism ourselves or “as the custodians of freedom and the occupants of the privileged lands of plenty, go on trying to increase freedom and decrease injustice?”⁶⁹ A globalized American bioethics, infused with human rights, would have to pursue global justice.

65. SALMAN RUSHDIE, *STEP ACROSS THIS LINE* (2002).

66. *Id.* at 381.

67. *Id.*

68. *Id.*

69. *Id.*