

In Defense of Human Rights

A non-religious grounding in a pluralistic world

Ari Kohen

Routledge Innovations in Political Theory

In Defense of Human Rights

The argument that religion provides the only compelling foundation for human rights is both challenging and thought-provoking, and answering it is of fundamental importance to the furthering of the human rights agenda.

This book seeks to establish an equally compelling non-religious foundation for the idea of human rights, engaging with the writings of many key thinkers in the field, including Michael J. Perry, Alan Gewirth, Ronald Dworkin, and Richard Rorty. Ari Kohen draws on the Universal Declaration of Human Rights as a political consensus of overlapping ideas from cultures and communities around the world that establishes the dignity of humans, and he argues that this dignity gives rise to collective human rights. In constructing this consensus, we have succeeded in establishing a practical non-religious foundation upon which the idea of human rights can rest.

In Defense of Human Rights will be of interest to students and scholars of political theory, philosophy, religious studies, and human rights.

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For Saba and Safta, who taught me, through their everyday actions, about the twin virtues of human rights and education and set me on this path before I even learned to walk.

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Prologue

Starvin' for Justice

Each summer, a group of activists arrives at the marble steps of the Supreme Court of the United States to protest the death penalty. This assembly, usually numbering no more than twenty but occasionally swelling to as many as fifty, begins its vigil on June 29 and remains until July 2. They carry banners, they distribute leaflets, they urge passersby to sign petitions, they host a rock concert, they sell t-shirts, buttons, and bumper stickers, they carry out a mock execution, they give interviews to reporters, and they drink a lot of water. The bulk of their activities are designed to educate the public about capital punishment, but they drink as much as they do because their four days and nights at the Court are spent without food. For thirteen years, the group – known as the Abolitionist Action Committee – has marked the anniversaries of two landmark Supreme Court cases in this way.¹

The Fast & Vigil to Abolish the Death Penalty – or Starvin' for Justice, as it is known amongst participants – draws activists from a variety of organizations, including the American Civil Liberties Union, Amnesty International, Citizens United for Alternatives to the Death Penalty, Dorothy Day Catholic Worker House, Murder Victims' Families for Reconciliation, and the National Coalition to Abolish the Death Penalty. Some live in the area, but many travel from as far away as Alaska, California, Texas, Michigan, and Florida; they have also been joined in the past by people from Canada, Italy, and Great Britain. The participants hold their position on the death penalty for a variety of reasons, but all clearly have a deep commitment; some have lost loved ones to violent crime or to execution, some have been exonerated and released from death row, some believe in the right to life as a universal principle of human rights, and some believe that only God may give or take a life.² Whatever their reason for spending these four days at the Supreme Court, a strong bond is quickly built amongst long-time and first-time attendees.

Happy to be in one another's company, Fast & Vigil participants must agree to abide by only two simple rules: the first is a pledge of nonviolence and respect, while the second states that "those who choose not to fast are asked not to discuss or consume food at the Fast & Vigil site."³ A third,

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unwritten, rule makes clear that opposition to the death penalty has occasionally made strange bedfellows: participants are discouraged from discussing their views about abortion, especially with passersby. When asked about the group's stance on abortion, participants generally respond by saying that individuals have their own opinions but that the group as a whole does not take a position. Behind all of this is the recognition that such conversations are both off-topic and can quickly cause tempers to flare. As Ronald Dworkin notes, "The war between anti-abortion groups and their opponents is America's new version of the terrible seventeenth-century European civil wars of religion."⁴ Importantly, all of the activists at the Supreme Court believe that human life is intrinsically valuable. Some of them, however, believe that abortion and the death penalty are both morally wrong because both take human lives. Others do not believe that an unborn fetus constitutes a human being in the same way that the occupant of a cell on death row does (if at all); therefore, they contend, only the death penalty involves the deliberate killing of a human being. In one sense, the debate that would likely rage if these conversations took place at the Fast & Vigil is a political one, and the merits of both sides have been thoughtfully weighed by the Supreme Court. But it is also a religious debate, concerning as it does the sanctity of life, as well as the rights of the state in opposition to the dictates of God. And for now, the Catholics, Protestants, Lutherans, Unitarian Universalists, Jews, Buddhists, agnostics, and atheists who attend the Fast & Vigil avoid discussions of religion. For four hot and hungry days, no one asks *why* anyone else is opposed to the death penalty; it is enough simply to know that they *are*. Even so, I suspect that many are curious about the motivations of their companions at the Court.

Indeed, when dealing with complex moral issues like the death penalty or abortion, it might be insufficient to make claims about human rights as though they are self-evident. The failure to look closely at the reasons behind the common belief that the right to life is nonderogable has resulted in the occasional uncomfortable moment. Just before breaking the fast in 2003, for example, one of the Catholic Workers spoke passionately about the belief she presumed that everyone shared, singling out the "crime" of abortion as she encouraged those who had fasted against the death penalty to continue to oppose all forms of murder. Many of those who were fasting, however, did not share her conviction that abortion and the death penalty were two sides of the same coin, and were particularly offended because she had not been an active participant throughout the Fast & Vigil. Those who were offended, however, kept their discomfort to themselves and no discussion took place between the Catholic Worker and those she had offended; in the end, it was easier for the former to keep their feelings to themselves than it would have been to delve into a conversation about the reasons for protesting the death penalty and not abortion. A more lighthearted example comes from an

overheard conversation between a protester and a Supreme Court tourist. The former – holding a sign that read, “Stop State Killing!” – was approached by the latter, who patted him on the shoulder and thanked him for speaking out on such an important issue. After the two had exchanged pleasantries for a moment, the tourist pointed toward some protesters with signs that explicitly declared opposition to the death penalty and said, “I can’t agree with those sons of bitches, though.” Perplexed, the protestor replied, “I have to tell you, actually, I’m one of those sons of bitches.” The tourist had mistakenly associated state killing with abortion rather than the death penalty and was shocked to learn that everyone around him was protesting the latter, something he believed in strongly. In his mind, it was clear that abortion is murder and therefore constitutes a moral wrong; capital punishment, however, is not murder and he declined an invitation to consider whether there is any kind of contradiction in this sort of thinking.

Interestingly, the offended protesters from the first example and the horrified tourist from the second example have two things in common. They hold opposite positions on abortion and the death penalty, but neither is opposed to killing as such. Also, neither seems to be scratching the surface of their convictions, examining the reasons that underlie their quite different positions on these controversial issues. But, for the purpose of this project, it is the reasons, not the convictions, that are of primary importance. The reasons behind believing that either abortion or the death penalty is a violation are the most crucial components of any claim about the inalienable right to life (of either the unborn fetus or the murderer), as they provide the basis for our understanding of the idea of human rights. Indeed, even if we turn our attention to less controversial claims, like the right not to be tortured, we must confront the question of whether there is any reason to believe that we are the bearers of rights. As Michael Perry notes, “The fundamental challenge to each and every human rights claim – in particular, to each and every claim about what ought not to be done to any human being or what ought to be done for every human being – is a demand for reasons.”⁵ For some, there is a particularly salient feature or quality inherent in human beings from which our rights spring. For others, the focus on qualities is a wrong turn taken long ago by theologians and philosophers; instead, they argue that one can articulate reasons that do not depend on human nature but on the political decisions of the past fifty years. Human rights, they contend, are grounded in the many international treaties, conventions, and declarations that have been drafted, signed, and ratified since the creation of the United Nations.

To return to our protestors and, in particular, to my earlier comment that many are curious about their companions’ motivations, we need only consider the Catholic Worker who assumed that she would not be offending anyone by expressing her opposition to abortion in front of people committed to ending the death penalty. Indeed, she might be surprised to

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find that individuals are so dedicated given that they do not believe human beings are the sacred children of God. This Catholic Worker is a real-life example of the academic argument put forward by Perry that “For many religious persons . . . the idea of human rights simply does not make sense, it does not exert a claim, apart from, cut off from, the Gospel vision of the world and of our place in it – or from some equivalent religious vision.”⁶ With this in mind, we can easily imagine her asking for a list of the reasons that motivate the non-religious human rights activist. For, if convicted murderers are not considered sacred – have no relation to God – why should our society be prohibited from putting them to death? If a captured terrorist has knowledge of an impending attack on innocent civilians, and if that terrorist is not created in the image of God, why must we refrain from utilizing torture to extract precious, life-saving information?⁷ In all that follows, I will offer what I believe is a compelling, non-religious answer to questions of this sort. I will do so, in part, as a response to the argument put forward by Perry that, at the very heart of the idea of human rights, lies a fundamentally religious concept, the notion of the sacredness of persons. Along the way, I will examine a variety of contemporary non-religious theories of human rights – those of Alan Gewirth, Ronald Dworkin, and Richard Rorty – and offer critiques of each.

Lest anyone assume that this project is simply one more example of philosophy done for its own sake, let me close this prologue with a quotation that describes what I take to be the very real stakes of the argument that follows. Amy Gutmann poses the question quite nicely when she asks:

What, pragmatically minded people might ask with some incredulity, is at stake in the equally heated – and quite common – arguments about the metaphysical and moral foundations of human rights? These arguments – for example, about human agency, dignity, and natural law – tend to be quite abstract, and it may therefore be tempting to assume that not much of practical importance is at stake.⁸

While this point is well-taken, she continues with an answer with which I am very much in agreement:

What is at stake in determining the foundations of human rights is often the very legitimacy of human rights talk in the international arena. If human rights necessarily rest on a moral or metaphysical foundation that is not in any meaningful sense universal or publicly defensible in the international arena, if human rights are based on exclusively Eurocentric ideas, as many critics have (quite persistently) claimed, and these Eurocentric ideas are biased against non-Western countries and cultures, then the political legitimacy of human rights talk, human rights covenants, and human rights enforcement is called into question.⁹

As I will argue throughout this book, the idea of human rights is based on universal ideas about the inviolability of the human person. It is an idea that can be embraced by both Western and non-Western cultures and communities, and its fulfillment is one for which deeply religious and deeply non-religious people alike can work.

Introduction

The first day of class

On the first day of a new semester, I always begin by asking students enrolled in my International Conflict and Violence class to define a list of terms that will play an important role in all of our discussions. And each semester they have the least amount of trouble defining the same term: human rights. Some point out that there exists quite a long list of these rights, that the list was finalized in 1948, and that it came to be known as the Universal Declaration of Human Rights; others include in their definitions the fact that violations of these rights occur with disturbing regularity all over the world. To be fair, there are always a few students who take the easy way out and tell me that human rights are rights that all human beings have. Circular though it sounds, there is technically nothing wrong with this definition; human rights *are* rights that we all hold solely by virtue of our being human. And there is much to be gleaned from a closer look at this simplistic definition. For once they have started defining terms, students typically want to continue, and they add to their initial definition of human rights by looking more closely at the idea of rights. Rights, they note, are guarantees; if I have the right, for example, to speak freely, then no one may prevent me from doing so. If I am so prevented, I need only claim my right – pointing to the language of the American Bill of Rights or the Universal Declaration – and I should quickly find my grievance redressed. At the very least, there is a system in place by which such grievances can be brought forward, complete with courts to adjudicate the issue. This, my students argue, is the power of rights: they imply an obligation on another's part.¹ Further, and with only a minor amount of encouragement, these students will take their idea forward a few additional giant leaps, noting that, because they are rights that are guaranteed to all human beings, human rights cannot be bartered, sold, stolen, or otherwise removed. In other words, the only way one can truly lose one's human rights is to cease to be human, a seemingly impossible scenario.

All of this, my students tell me, is relatively simple. They have, after all, just finished defining much more difficult terms like terrorism and nationalism. It becomes infinitely more challenging when I ask them for the reasoning behind the idea that human beings have all of these rights. From

where, for example, do I derive my right to free speech? And is there something about me that compels governments the world over to refrain from imprisoning me indefinitely in the absence of a proper trial? What reasons can we give to shore up our belief that no one ought to be subjected to torture or other ill-treatment? William F. Schulz makes this point effectively with a similar, poignant question:

In Shakespeare's *The Merchant of Venice*, Shylock cries out, "I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die?" What do we say to the killer who responds to Shylock, "Yes, a Jew has eyes but so does a pig"?²

It is here that my students run into trouble and really begin to disagree with one another. Some argue that God is the ultimate guarantor of our rights, that we are all the children of God, and that we are entitled to certain standards of treatment because we are all created in God's image. This answer, while perfectly valid, does not appeal to those in the room who do not believe in God but who still believe that they and others have rights. Instead, some argue that their rights are based on human dignity, while others contend that rights are nothing more than incredibly useful social constructs (perhaps the most fashionable term in the academic lexicon today). Though I have only participated in a handful of discussions on this topic, I am fairly confident that most sound like the one I am recounting here and like the one from a Houston classroom that Schulz recounts:

"Do only Americans have the right to a fair trial or to free speech?"

"No," most of the kids replied. "Everybody does."

"OK, but since our constitution only applies to Americans, on what basis would we argue with somebody who says either 'Your Constitution is just plain wrong' or 'Well, OK, maybe your Constitution is right for you but not for me and my people. We don't believe in all those rights you allow your people to have?'"

At this point the more alert students were starting to turn some of these questions over in their minds.

"I'd say, 'It's because God gave us those rights,'" somebody interjected.

"But what if the person we're talking to doesn't believe in God, or what if he or she is of a different religion than we are and says, 'Well, my God didn't give me those rights'? What do we say then?"

"We could say that human beings just deserve those rights," a smart kid retorted. "Rights are what make us human. Chairs and

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tables don't have rights. Rights are just the right thing to do. It's just the moral thing."

"But what if somebody tells us that he or she thinks what makes us human is obeying the wishes of our leaders, even if the leaders deny us our rights. What if somebody tells us he or she thinks it is perfectly moral to torture a person or throw someone in jail without a trial. How do we refute that?"

After we had gone round and round on these questions for a few minutes, a girl in the back tried to settle the matter: "Well, OK," she said. "Maybe we can't argue others into believing our way for sure. But what we *can* do is to say to them, 'Look, this is just the best way to live. Do you really want to live in a world without any rights? We think this way works best, and we think you should try it too.'"³

The students in Schulz's classroom seem satisfied at this point, but mine have traditionally not been as easy to please. If three different people can believe three completely different things about the source of our rights, then perhaps they stand on shakier ground than anyone imagined. Interestingly, it is the religious group that is most dissatisfied at the end of the day, though they are not frustrated with their own answer. They want to know where human dignity comes from if not from God and they want to know why anyone ought to respect a social construct the minute it becomes inconvenient to do so or when it is clear that it is not *their* social construct. It is easy enough, they argue, to understand the language of human rights if one believes that human beings are the sacred children of God, but a good deal more must be said if one is not of that belief.

Indeed, Michael Perry makes this argument in a particularly forceful and engaging manner. This book will consider in depth his assertion that:

There is no intelligible (much less persuasive) secular version of the conviction that every human being is sacred; the only intelligible versions are religious The conviction that every human being is sacred is, in my view, inescapably religious – and the idea of human rights is, therefore, ineliminably religious.⁴

Perry's argument presents one of the most thought-provoking aspects of human rights theory and answering his challenge is, on my reading, of fundamental importance to the furthering of the human rights agenda. For if we are able to discern a compelling non-religious foundation for the idea of human rights that can stand alongside the religious one, we will have made it easier for an ever-widening group to reach a consensus on the manner in which they ought to treat one another, even if they are unable to reach any other agreement.⁵

Chapter 1 focuses both on Perry's argument that a religious framework provides the only intelligible grounding for any theory of human

rights and also on a provocative critique of the idea of rights. I begin by presenting Perry's claim that at the center of the idea of human rights lies a fundamentally religious concept, the notion of the sacredness of persons. To do so, I examine Perry's discussion of Christianity, his example of a persuasive religious grounding for human rights. It is also important to consider Perry's definition of a religious worldview – one that is “grounded or embedded in a vision of the finally or ultimately meaningful nature of the world and of our place in it.”⁶ Further, I consider whether the expansive scope of Perry's definition stretches our understanding of religion beyond its breaking point and, of course, whether conventional religious worldviews fit comfortably within it. In the end, I agree with Perry that a religious worldview – one that contains a vision of equality and of human connectedness – provides a persuasive grounding for the idea of human rights; however, I also argue that organized religion has done a particularly poor job of translating these concepts into action and that, in fact, the history of religion can be seen as antithetical to the concept of human rights. Finally, I examine one of the most profound challenges to the idea of using religion as a justification for human rights, that of Friedrich Nietzsche. If human rights take God as their source, then certainly the death of God spells disaster for the entire concept. Alternatively, if the concept is constructed by human beings, then it is the result of self-interested calculation, a tool of the weak to keep true greatness enslaved to the sort of mediocrity that ensures the survival of the weakest. As Perry correctly argues, one comes away from a reading of Nietzsche with the sense that human rights either cannot or should not be defended.

The remainder of the book proceeds from the spiritual void that Nietzsche's theory opened and grapples with Perry's conclusion – in the face of that vacuum – that accepting Nietzschean conclusions makes the idea of human rights untenable. A number of contemporary theorists have attempted to locate a non-religious defense of human rights that can work around the twin problems of self-interest and the death of God. Chapter 2 looks at the first of these, Alan Gewirth's argument from pure reason. In this chapter, I examine his reasoning for constructing a theory, namely that existing theories are fundamentally flawed and leave the idea of human rights without a logically consistent foundation, before considering in careful detail Gewirth's own claims for the Principle of Generic Consistency (PGC). Having looked at his critique of numerous other theories, as well as at his own argument about human action grounding basic rights to freedom and well-being, I then offer a critique of Gewirth's PGC. Ultimately, the chapter's conclusion is that Gewirth's theory relies too heavily on the notions, first, that we have a meta-desire not to contradict ourselves and, second, that we are unable to find persuasive justifications for our behavior that might allow us to avoid self-contradiction. If one is not troubled by charges of self-contradiction or, as is more often the case, one does

not recognize that one's victim is as much a human being as oneself, Gewirth's theory will not seem particularly persuasive.

Chapter 3 considers a non-religious conception of sacredness based on creative investment, as outlined by Ronald Dworkin. I begin by examining how Dworkin arrives at his conclusion about the value of life without necessarily referring to God, and then use the lens of the contemporary abortion controversy to think through the implications of his argument. After addressing the debate over why Dworkin thinks human life has value – based on human and biological creativity – I consider Perry's objections to this theory of non-religious sacredness, namely that its subjective reasoning cannot bear the weight necessary to ground the idea of human rights. While Perry is correct about the problem this presents for Dworkin, I argue that his overall approach is mistaken, as the concept of sacredness simply cannot be understood in the absence of a religious cosmology. Having said that, I argue that Perry's conclusion about the necessity of religion to human rights does not hold; looking closely at the etymological roots of the terms "sacred" and "dignity," I challenge Perry's conflation of those terms. Instead, I argue that the contemporary language of human rights is based on the concept of human dignity rather than sacredness, and that – contrary to existing theoretical work on this subject – the two words should not be treated as synonyms.

Chapter 4 seeks to answer the lingering question left open at the end of the previous chapter: on what basis might a non-religious person claim that human persons possess inherent dignity? Though our knowledge remains incomplete at present, I want to argue that the information we have begun to compile about the human mind can yield some interesting conclusions about the idea of human dignity. I begin by briefly constructing an argument for a human nature that is rooted in evolutionary biology. Having done so, I then make a case for locating personhood in the human mind; in particular, I consider arguments in favor of and against linking personal identity with either higher- and whole-brain activity. Next, I turn to a discussion of the differences between the fetus, the human animal in a persistent vegetative state, and the human person with a view to sorting through some possible sources of personhood. I conclude by offering a resolution to these controversies – which David DeGrazia calls "the boundaries of our existence"⁷ – and, in so doing, demonstrating the priority of dignity to personhood. Ultimately, I argue that an intelligible grounding for human dignity – itself a foundational component of human rights – can be arrived at through an argument about the way our minds function; more specifically, I contend that dignity might be thought of as a feature of higher-brain activity and, in making this case, I provide one possible answer to the question of how a non-religious person might arrive at the concept of human dignity.

Chapter 5 looks closely at Richard Rorty, who "has recommended that we simply stop trying to defend the idea of human rights"⁸ and that we,

instead, simply focus on expanding our contemporary human rights culture. Doing as Rorty recommends, Perry and many others argue, could open the door to any number of illiberal (and dangerous) possibilities. That said, it might instead suggest a plausible non-religious grounding for the idea of human rights. It is to a discussion of these two possibilities that I turn in this chapter, beginning with a detailed look at the Rortyan ideal of liberal irony and the question of whether this sort of irony is a desirable, or even psychologically possible, character trait. I then bring the disagreement between Rorty and those theorists he refers to as metaphysicians into sharper focus by examining the figure of the illiberal ironist, who is armed with the same tools as his/her liberal counterpart but reaches the opposite conclusion about whether to prevent human suffering. Finally, the chapter considers the place of sympathy and solidarity in what I take to be Rorty's answer to his detractors. I argue throughout that Rorty has been unsuccessful in abandoning metaphysical claims, as he relies on the foundational idea that sympathy and solidarity are natural and universal characteristics of humanity; indeed, Rorty's thoughts on the self-creating aspect of the brain dovetail nicely with the argument – made in the previous chapter – about the universal complex human mind. In making this case, Rorty has (perhaps unwittingly) succeeded in providing an answer to Michael Perry's assertion that "the idea of human rights is . . . ineliminably religious"⁹ by suggesting a plausible non-religious foundation. The final chapter builds upon the possibility to which Rorty's theory alludes, while avoiding the problem of attempting to do away with foundations.

Chapter 6 puts forward what I take to be a plausible non-religious foundation for the idea of human rights. In particular, I argue that compelling religious foundations have led non-religious rights theorists to focus on finding features or qualities inherent in human beings from which our rights spring, a mistake that can be seen clearly in the theories of both Gewirth and Dworkin. Following Rorty, I contend that these features or qualities are not found so much as they are created. While I believe that Rorty's argument – that telling sentimental stories is the most practical method for increasing our sense of solidarity with those we once considered "others"¹⁰ – is an interesting response to Perry, I depart from it here because Rorty is unsuccessful in abandoning the idea of universal truths about human nature. Though I agree with Rorty – indeed, I have fleshed out and made explicit his implicit argument in my fourth chapter – I make a more procedural and practical argument here, one that steps back from arguments about a universal human nature. To do so, I look to the Universal Declaration of Human Rights to claim that human rights represent a political consensus of overlapping ideas from cultures and communities around the world. It is not simply that no single tradition was victorious in setting out the foundation of human rights that others could accept, though it is true that none was; instead, the Declaration's

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chief virtue is that everyone was able to agree upon and endorse a *common* foundation: the dignity of the human person. The nations of the world may disagree on a great many things – philosophical as well as practical – but they have all agreed on this important point: every human being is entitled to the rights enshrined in the Universal Declaration by virtue of the inherent dignity that is common to us all. Some might argue that our dignity stems from our sacredness, from the *Imago Dei*, while others might prefer my argument for a less other-worldly source. At bottom, though, we have all agreed that human beings possess dignity and that, by virtue of this agreement, they have rights; this idea can be embraced by those who subscribe to what Perry calls a religious cosmology and also by those who do not. In constructing this consensus, then, we have succeeded in establishing a practical non-religious foundation upon which the idea of human rights can rest.

1 Michael Perry and the religious cosmology

Foundations and critiques of human rights

The concept of human rights ultimately rests on the premise that there are some things that ought to be done for human beings and other things that ought not to be done to human beings in light of the fact that they are human. These rights stem from the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”¹ Some would argue that this notion has its roots in the natural law and natural rights tradition that is an important strand of Western political thought,² and others would point out that Eastern philosophy neither ignores nor is fundamentally opposed to the concept of rights.³ Finally, many people would claim that human rights have their origin in the Jewish and Christian traditions, while others would argue that nearly every major religion has its version of the Golden Rule.⁴ It may well be from the insistence that we treat others as we wish to be treated ourselves that we can deduce the rights we have today, but there is also a long-standing debate about whether rights can be found in traditional religious texts at all. In examining the Bible, for example, we might conclude instead that people have duties to one another – and to God – but no rights, *per se*.⁵ To put a finer point on it, there are injunctions against killing and stealing in the Old Testament, but these do not necessarily correspond to rights to life and property; likewise, the New Testament encourages people to treat one another as they themselves want to be treated, but does not provide a mechanism for anyone to claim injury in the event that they do not. In other words, these ancient religious texts do not seem to speak in the language of rights to which we have become accustomed. At the same time, strands of every major world religion seem to be quite supportive of the notion of inherent dignity, which underlies our contemporary understanding of human rights.

To say that religious texts are inclusive of human rights is very different from saying, as Michael Perry does, that a religious worldview provides the only intelligible grounding for those rights. Indeed, the most provocative question is not whether the concept exists in each of the world’s religions, but whether it can exist independently of religion. As Perry asks:

What are we to make of such talk: talk about “the inherent dignity” of all human beings – about all human beings as members of one “family” – and about the importance, therefore, of all human beings acting toward one another “in a spirit of brotherhood”? It is easy enough to understand such talk as *religious* talk But is it possible, finally, to understand such talk in a nonreligious (“secular”) sense?⁶

A good deal of work must be done to answer this question, and this chapter will begin to do so. The first section presents Perry’s claim that at the center of the idea of human rights lies a fundamentally religious concept, the notion of the sacredness of persons. To do so, I examine his example of a persuasive religious grounding for human rights, the Christian conception of human flourishing that stems from a life of loving and serving others. It is also important to consider Perry’s definition of a religious worldview – one that is “grounded or embedded in a vision of the finally or ultimately meaningful nature of the world and of our place in it”⁷ – and that is the focus of the second section. Importantly, this section also looks closely at the tension that exists between organized religion and human rights, as well as whether the expansive scope of Perry’s definition stretches our understanding of religion beyond its breaking point and, of course, whether non-traditional religious worldviews fit comfortably within it. In the end, I argue that a religious worldview – one that contains a vision of equality and of human connectedness – provides a persuasive grounding for the idea of human rights; however, I will also show that organized religion has done a particularly poor job of translating these concepts into action and that, in fact, the history of religion can be seen as antithetical to the concept of human rights. The final section examines one of the most profound challenges to the possibility of a religious justification for the idea of human rights, posed by Friedrich Nietzsche. If human rights take God as their source, then certainly Nietzsche’s postulation of the death of God spells disaster for the entire concept. Alternatively, if the concept is socially constructed, then it is the result of self-interested calculation, a tool of the weak to keep true greatness enslaved to the sort of mediocrity that ensures the survival of the weakest. As Perry correctly argues, one comes away from a serious reading of Nietzsche with the sense that rights either cannot or should not be defended.

Human sacredness and human rights

“The fundamental challenge to each and every human rights claim,” Perry tells us, “is a demand for reasons.”⁸ He has authored a book and a number of articles in an attempt to examine whether the extant reasons are compelling ones. On Perry’s reading, all hitherto articulated non-religious reasons either fall well short of providing a solid foundation for human rights or are unintelligible. I will look closely at Perry’s critiques of

both Ronald Dworkin and Richard Rorty in later chapters; in this chapter, I focus solely on the grounding for human rights that Perry believes can withstand serious scrutiny, the conviction that every human being is sacred. He begins his argument with a quotation from R.H. Tawney that sets our stage. Tawney argues that “*The essence of all morality is this: to believe that every human being is of infinite importance, and therefore that no consideration of expediency can justify the oppression of one by another.*”⁹ Clearly, here, we have an articulation of the basic idea of human rights, that the human person is inviolable. Tawney continues, however, by noting that, “*to believe this it is necessary to believe in God.*”¹⁰ Although Tawney’s own reasoning for the necessary connection between human rights and religion is not given, Perry clearly articulates what he believes it to be, as he ascribes to Tawney the belief “that the conviction that every human being is sacred is inescapably religious.”¹¹ Leaving aside the slight discrepancy in word choice – Tawney says “is of infinite importance,” which Perry’s translates to “is sacred” – both articulate the same basic point, namely that the human person is inviolable because of her relationship to God. It is human sacredness, then, that Perry focuses on throughout and his project is to confirm that the sacredness of persons can only be understood as a religious concept. Doing so, he argues, will show precisely why “For many religious persons . . . the idea of human rights simply does not make sense, it does not exert a claim, apart from, cut off from, the Gospel vision of the world and of our place in it – or from some equivalent religious vision.”¹²

To make his point clearer, Perry offers the example of Christianity to provide some detail on the connection between human sacredness and the inviolability of persons. While Perry focuses on his own religious tradition, he also makes clear that he recognizes there are “ample materials in other religious traditions out of which one can construct, or reconstruct, a relevantly similar version of the conviction [that every human being is sacred].”¹³ At the heart of Perry’s example is a rather simple, well-known injunction and it provides the ballast for Christians’ understanding of human rights: “the instruction given by Jesus at a Passover seder on the eve of his execution: ‘I give you a new commandment: love one another; you must love one another just as I have loved you.’”¹⁴ Of course, Jesus was not only speaking of the people at the table; instead, he had in mind a far broader understanding of those who should be loved and of the type of love – love-as-agape – that should be afforded them. This is very much in line with the example that Perry gives in a more recent essay about the religious nature of the notion of human inviolability. He sketches out the belief system of a woman named Sarah whose faith helps her to love as Jesus commanded:

She loves all human beings. She loves even ‘the other’. She loves, that is, not only those for whom she has personal affection, or those with

whom she works or has other dealings, or those among whom she lives; she loves even those who are most remote, who are unfamiliar, strange, alien, those who, because they are so distant or weak or both, will never play any concrete role, for good or ill, in Sarah's life.¹⁵

It is easy enough to understand how Sarah might love those who are close to her, but one might justifiably wonder, in reading about Sarah, whether her love for those who do not touch her life in any way can properly qualify as love. Further, Perry suggests that:

Sarah loves even those from whom she is most estranged and towards whom she feels most antagonistic: those whose ideologies and projects and acts she judges to be not merely morally objectionable, but morally abominable . . . Sarah loves even her enemies; indeed, she loves even those who have violated her.¹⁶

The depth of religious belief that this would require is, for many, unimaginable. It seems to me, in fact, that Sarah would not merely be a run-of-the-mill believer but a saint, a person of a fundamentally different quality from the people that we meet in our daily lives. But Perry is not alone in making this claim about the staggering requirements of religious love. Raimond Gaita, in a quotation that Perry employs, suggests that "the language of love . . . compels us to affirm that even those who suffer affliction so severe that they have irrevocably lost everything that gives sense to our lives, and the most radical evil-doers, are fully our fellow human beings."¹⁷ In looking carefully at Gaita's words, however, we might wonder whether the sort of acknowledgment or affirmation he proposes is not quite a bit different from actually loving those who directly violate us. I might, for example, affirm the humanity of the man who steals from me, but isn't it something else entirely to love him?

But these are not puzzles for those who subscribe to the religious worldview that Perry sketches. For them, it is entirely possible to love those who are near to us, far from us, love us in return, or seek to do us harm. For Christians, love is not necessarily associated with affection; it can be, instead, something spiritual and selfless, as evidenced by Jesus' example. Perry says:

love-as-agape does not require that we feel affection; such love consists, minimally, in wishing that the evildoers—who are understood/seen to be truly, fully human—somehow achieve their perfection as human beings. In Sarah's case, this means that Sarah wants even the evil-doers somehow to achieve eternal union, in love, with God and with all their sisters/brothers.¹⁸

It is in this discussion of what constitutes human flourishing that Perry's example of a religious worldview begins to take a more definitive shape.

Underlying Sarah's feelings toward others, Perry tells us, is a particular understanding of the reason for our existence itself:

For us – or, at least for most of us – it is a fundamental conviction, born not merely of our own experience, but of the experience of the historically extended communities (“traditions”) that for many of us have been formative, that an important constituent of one's own well-being – of one's authentic flourishing as a human being – is concern for the well-being of one's sisters and brothers.¹⁹

On this reading, the Christian seems to care deeply about the welfare of other people – and, indeed, views them as inviolable – for a somewhat self-serving reason. On the one hand, those who subscribe to this worldview work toward their loving attitude for the good of the other, regardless of the position that the other takes toward them. On the other, though, they love the other because they believe “that a life of loving connection to one's sisters and brothers is . . . a flourishing life and that a life of unloving – uncaring – alienation from one's sisters and brothers is . . . a withering life.”²⁰

Christians who love their sisters and brothers receive great benefit from their loving attitude: “Sarah explains that the extent we become persons who love one another, to that extent we fulfill – we perfect – our created nature and thereby achieve our truest, deepest, most enduring happiness.”²¹ Perry wants to address this problem; in fact, he argues that Sarah's motives can be impeached only by those who misunderstand rationality and action. On this point, it will be useful to quote him at some length:

Does Sarah do what she does for the other – for example, does she contribute to Bread for the World as a way of feeding the hungry – for *self-regarding* reasons? Does she do so, say, because it makes her happy to do so? She does not. (This is not to say that feeding the hungry doesn't make Sarah happy. It does. But this is not why she feeds the hungry.) Given the sort of person she is, the reason – the *other-regarding* reason – Sarah feeds the hungry is: “The hungry are my sisters and brothers; I love them.” Now, a different question: Why is Sarah committed to being the sort of person she is, and why does she believe that everyone should want to be such a person? *Pace* Augustine, Sarah's answer is self-regarding: “By becoming persons who love one another, we fulfill our created nature and thereby achieve our truest, deepest, most enduring happiness.” According to Sarah, it is not individual acts of love that necessarily make one happy; it is, rather, becoming a person who loves the other “just as I have loved you.” “[S]elf-fulfillment happens when we are engaged from beyond ourselves. Self-fulfillment ultimately depends on

self-transcendence. This is essentially the claim that is made by religion, that the meaning of our lives is to be found beyond ourselves.”²²

In a series of footnotes to this discussion of self- and other-regarding reasons for action, Perry embraces what he sees as a decidedly Aristotelian viewpoint. For Aristotle,

Happiness is the single final answer to the question “why do that?”, the answer that survives the conflict with every rival interest or desire. In referring to happiness, we refer, not to the satisfaction of impulses, but to the fulfillment of the person.”²³

Whether we accept Perry’s analysis depends on the importance we assign to the idea of purity of motives. While it is certainly possible to question the motivations that Christians like Sarah possess, it is equally (if not more) important to note that the result she achieves is one that does a good job of grounding human rights. While Sarah might not have purely other-regarding reasons for loving others, it might be that there is no such thing as a purely other-regarding reason and that, in fact, Sarah comes closest to this ideal. The quotation above, I think, is helpful in highlighting how she comes so close. Clearly, Sarah has a desire to feed the hungry. Following Harry G. Frankfurt, we will call this and her many other reasons for action first-order desires, “desires to do or not to do one thing or another.”²⁴ He goes on to note that “Besides wanting and choosing and being moved *to do* this or that, men may also want to have (or not to have) certain desires and motives.”²⁵ In addition to her first-order desire to feed the hungry, then, Sarah has a second-order desire to be the sort of person who is fulfilled through service to others. While her first-order desire might be purely other-regarding, as Perry claims, Frankfurt would argue that she follows through on it because of her very personal second-order desire. It might be the case that Sarah’s reasons for action are purely other-regarding rather than self-regarding, but it seems more likely that one cannot act in a purely other-regarding manner. Much of Perry’s discussion of Christian love, in fact, deals with the lover rather than the one being loved, but this does not change the fact that Sarah has a profound respect for the human rights of others and acts upon it. As we have seen, Sarah achieves fulfillment as a human being when she loves her sisters and brothers; conversely, “to fail to love the Other as sister/brother – worse, to hate the Other – is to succumb to the pathology of estrangement; it is, to that extent, to wither as a human being rather than to flourish.”²⁶

Given our desire to live a flourishing life, filled with happiness, rather than a withering life, we ought to love our brothers and sisters. The end, however, is not simply living a fulfilling life; as Perry notes, there is a more important reason – for Christians like Sarah – to love other human beings: the long shadow of the afterlife. Rather than attempting to figure out who

counts as one's sister or brother so that one may behave toward them as Jesus instructs, Perry points out that failing to love everyone leads to a fundamental estrangement with God. And this rupture has disastrous and irreparable consequences, as noted in the "Last Judgment" passage in the Gospel of Matthew that Perry quotes:

When the Son of Man comes in his glory, and all the angels with him, he will sit on his throne in heavenly glory. All nations will be gathered before him, and he will separate the people one from another as a shepherd separates the sheep from the goats. He will put the sheep on his right and the goats on his left.

Then the King will say to those on his right, "Come, you who are blessed by my Father; take your inheritance, the kingdom prepared for you since the creation of the world. For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me."

Then the righteous will answer him, "Lord, when did we see you hungry and feed you, or thirsty and give you something to drink? When did we see you a stranger and invite you in, or needing clothes and clothe you? When did we see you sick or in prison and go to visit you?"

The King will reply, "I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me."

Then he will say to those on his left, "Depart from me, you who are cursed, into the eternal fire prepared for the devil and his angels. For I was hungry and you gave me nothing to eat, I was thirsty and you gave me nothing to drink, I was a stranger and you did not invite me in, I needed clothes and you did not clothe me, I was sick and in prison and you did not look after me."

They also will answer, "Lord, when did we see you hungry or thirsty or a stranger or needing clothes or sick or in prison, and did not help you?"

He will reply, "I tell you the truth, whatever you did not do for one of the least of these, you did not do for me."

Then they will go away to eternal punishment, but the righteous to eternal life.²⁷

In stressing the religious response to the "who is my sister/brother" question, however, Perry lends more weight to the claim that religious people are more concerned about themselves than they are about others. In other words, it seems that one ought to act toward other human beings with love and compassion because one's eternal fate hangs in the balance.

Having looked at the idea of love-as-agape in some detail, the relationship between this sort of love and human rights continues to seem a bit tenuous, apart from the connection that Perry wants to make through the idea of sacredness. But Perry attempts to answer critics – such as myself – who see ulterior motives in the idea of Christian love, and who wonder whether love and human rights are at all related. He says:

The imperative to “love one another as I have loved you” can be understood . . . not as a piece of divine legislation, but as a (truly, fully) human response to the question of how to live What makes the imperative a *religious* human response and not merely a secular one is that the response is the existential yield of a religious conviction about how the world (including we-in-the-world) hangs together: in particular, the conviction that the Other is, finally, one’s own sister/brother – and should receive, therefore, the gift of one’s loving concern.²⁸

For Perry, then, there is a direct link between a belief in God and the idea of human rights. For Christians, this link can be expressed as follows: I believe in God, who created all human beings in His image and who instructed us to love one another as He loves us. I have concluded, in believing that we are all created in God’s image, that we are all sisters/brothers and that we are all sacred. I have further concluded, in believing that we ought to love one another, that a life of human flourishing can only be achieved by treating others as sisters/brothers and as sacred. Either way, my belief system compels me to recognize the human person as inviolable and to respect the human rights of the Other. This connection might not be as explicit in other belief systems as it is in Christianity, but Perry argues that it is assuredly present because the concept of a religious worldview has similar features across the many diverse world religions, despite some differences in expression and application. In his own words:

Just as there are differences among the precise religious visions adhered to by different sects within Christianity, there are differences among the precise visions adhered to by different world religions. . . . But such differences as there are ought not to obscure the fact that the experience of all human beings as sacred is widely shared among different sects and religions, albeit expressed – mediated – differently in different traditions.²⁹

The idea of a religious worldview

As we have seen, Perry argues that a religious worldview is necessary to achieve the sort of robust understanding of human rights that we hold

today. This is all well and good theoretically, of course, but it begins to break down once we consider the actual interaction between religion and rights.³⁰ Historically, respect for God's commandments did not seem to line up with a love of the Other or even a basic consideration for the Other's life. In some instances, in fact, God actually destroys human beings Himself or commands human beings to commit murder, as in the famous stories of Noah and Abraham. While God punishes the first recorded instance of murder – Cain's slaying of his brother, Abel – with banishment, it is not terribly long before men have become entirely corrupt and God decides to destroy them all: "And the earth was corrupt before God, and the earth was filled with violence. . . . And God said unto Noah: 'The end of all flesh is come before Me; for the earth is filled with violence through them; and, behold, I will destroy them with the earth.'"³¹ Perhaps just as famous as the story of Noah and the flood is that of God's test to determine whether Abraham was a true believer.³² In it, He commands Abraham to sacrifice his only son, Isaac, to Him and Abraham prepared to comply without hesitation. Only after the preparations have been completed and Abraham is poised to carry out God's request does an angelic representative intercede:

And Abraham stretched forth his hand, and took the knife to slay his son. And the angel of the Lord called unto him out of heaven and said: "Abraham, Abraham." And he said: "Here am I." And he said: "Lay not thy hand upon the lad, neither do thou any thing unto him; for now I know that thou art a God-fearing man, seeing thou hast not withheld thy son, thy only son, from Me."³³

In addition to these two examples, the Old Testament is filled with numerous stories involving slavery, intolerance, murder, and even genocide. Perhaps the most troubling is the proposed annihilation of the kingdom of Amalek, not only because of the genocidal intent of the Israelites but because Saul's failure to completely destroy them results in God's extreme displeasure and Saul's eventual loss of his kingdom. To capture the spirit of this passage, it will be necessary to quote at some length:

"Thus saith the Lord of hosts: I remember that which Amalek did to Israel, how he set himself against him in the way, when he came up out of Egypt. Now go and smite Amalek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass." And Saul summoned the people, and numbered them in Telaim, two hundred thousand footmen, and ten thousand men of Judah. . . . And Saul smote the Amalekites, from Havilah as thou goest to Shur, that is in front of Egypt. And he took Agag the king of the Amalekites alive, and utterly destroyed all the people with the edge of the sword. But Saul and the

people spared Agag, and the best of the sheep, and of the oxen, even the young of the second birth, and the lambs, and all that was good and would not utterly destroy them; but everything that was of no account and feeble, that they destroyed utterly. Then came the word of the Lord unto Samuel, saying: "It repenteth Me that I have set up Saul to be king; for he is turned back from following Me, and hath not performed My commandments" And Samuel came to Saul; and Saul said unto him: "Blessed be thou of the Lord; I have performed the commandment of the Lord." And Samuel said: "What meaneth then this bleating of the sheep in mine ears, and the lowing of the oxen which I hear?" And Saul said: "They have brought them from the Amalekites; for the people spared the best of the sheep and of the oxen, to sacrifice unto the Lord thy God; and the rest we have utterly destroyed." . . . And Samuel said: "Hath the Lord as great delight in burnt-offerings and sacrifices, As in hearkening to the voice of the Lord? Behold, to obey is better than sacrifice, And to hearken than the fat of rams. For rebellion is as the sin of witchcraft, And stubbornness is as idolatry and teraphim. Because thou hast rejected the word of the Lord, He hath also rejected thee from being king." . . . Then said Samuel: "Bring ye hither to me Agag the king of the Amalekites." And Agag came unto him in chains. And Agag said: "Surely the bitterness of death is at hand." And Samuel said: As thy sword hath made women childless, So shall thy mother be childless among women. And Samuel hewed Agag in pieces before the Lord in Gilgal.³⁴

The destruction of the Amalekites, rabbinic commentary tells us, was the final act of vengeance in a long-standing "feud between the tribes of Israel and this untamable race of savages" that dated back to an attack by Amalek on the weak and defenseless Jews in their exodus from Egypt.³⁵ While the commentary goes to some length to recognize that "The moral difficulty in connection with this command is very real," the conclusion reached by the rabbis is that "the truest mercy sometimes lies in the dispensation of sternest justice, and Israel here was the instrument of Divine Retribution."³⁶ Despite the forgiving nature of this rabbinic commentary for what would today be considered an obvious and horrific example of a crime against humanity, it is clear that the connection between a religious cosmology and loving the Other is a tenuous one "in a world – *our* world, the *real* world – that is often fiercely partial/local rather than impartial/universal."³⁷

It would be an obvious mistake, however, to conclude from these well-known Old Testament examples that the New Testament ushered in a world filled with a much more pacific and loving humanity. Indeed, the Holy Land of Jesus' day was populated by those who murdered one another over trivialities, were very hasty in their decisions to hurl stones at sinners, routinely refused assistance to the poor and infirm, and

colluded with the Roman authorities in their application of the death penalty.³⁸ And yet the New Testament on the whole spends markedly less time on the violence and abuse that people faced than the Old Testament – apart, of course, from the terrible violence of Jesus' own death by crucifixion – and focuses instead on the example of love, charity, and kindness that Jesus brought to humanity. Much more damaging to Perry's vision of the connection between Christianity and human rights are the centuries of atrocities carried out in the name of God once the persecuted Christians became the rulers following the conversion of the Roman emperor Constantine in 312. The following passage offers an illustration of the extremely violent and almost-immediate in-fighting that began once Christianity became an officially recognized and state-sanctioned religion in Rome:

The eighty or ninety sects, into which Christianity speedily divided, hated one another with an intensity that extorted the wonder of Julian and the ridicule of the Pagans of Alexandria, and the fierce riots and persecutions that hatred produced appear in every page of ecclesiastical history. There is, indeed, something at once grotesque and ghastly in the spectacle. The Donatists, having separated from the orthodox simply on the question of the validity of the consecration of a certain bishop, declared that all who adopted the orthodox view must be damned, refused to perform their rites in the orthodox churches which they had seized, till they had burnt the altar and scraped the wood, beat multitudes to death with clubs, blinded others by anointing their eyes with lime, filled Africa, during nearly two centuries, with war and desolation, and contributed largely to its final ruin. The childish and almost unintelligible quarrels between the Homoiousians and the Homoousians . . . filled the world with riot and hatred. The Catholics tell how an Arian Emperor caused eighty orthodox priests to be drowned on a single occasion; how three thousand persons perished in the riots that convulsed Constantinople when the Arian Bishop Macedonius superseded the Athanasian Paul; how George of Cappadocia, the Arian Bishop of Alexandria, caused the widows of the Athanasian party to be scourged on the soles of their feet, the holy virgins to be stripped naked, to be flogged with the prickly branches of palm-trees or to be slowly scorched over fires till they abjured their creed. . . . In Ephesus, during the contest between St. Cyril and the Nestorians, the cathedral itself was the theater of a fierce and bloody conflict. Constantinople, on the occasion of the deposition of St. Chrysostom, was for several days in a condition of absolute anarchy. . . . About fifty years later, when the Monophysite controversy was at its height, the palace of the emperor at Constantinople was blockaded, the churches were besieged, and the streets commanded by furious bands of contending monks.³⁹

And this, of course, is just the beginning. In a little more than a thousand years – from Constantine’s conversion to the outbreak of full-scale religious warfare between Catholics and Protestants in Europe – pious Christians would burn, drown, and torture hundreds of thousands – if not millions – of people with beliefs that differed from their own. These beliefs could be ones that were quite different (as exemplified by the persecution of Jews during the Spanish Inquisition), but just as often what constituted heresy was either not terribly far removed from the orthodox understanding of the day or a harmless derivation.⁴⁰ And this, of course, leaves out the centuries of destruction visited upon native populations around the world in the name of Christianity, as well as the violence meted out in full measure to the Muslims and Jews during the Crusades. As just one example, consider this eyewitness account of Jerusalem’s capture during the First Crusade in 1099:

Wonderful sights were to be seen. Some of our men (and this was more merciful) cut off the heads of their enemies; others shoot them with arrows, so that they fell from the towers; others tortured them longer by casting them into flames. Piles of heads, hands and feet were to be seen in the streets of the city. It was necessary to pick one’s way over the bodies of men and horses. But these were small matters compared to what happened at the Temple of Solomon, a place where religious services are normally chanted . . . in the temple and the porch of Solomon, men rode in blood up to their knees and bridle reins. Indeed it was a just and splendid judgement of God that this place should be filled with the blood of unbelievers since it had suffered so long from their blasphemies.⁴¹

Confronted with this sort of behavior, Perry’s vision of a religious grounding for the idea of human rights begins to sound a bit hollow. For, although the New Testament preaches quite the opposite sort of behavior from that which we now associate with many of its most fervent believers, it shares with other human rights violating regimes one destructive feature: what both Aleksandr Solzhenitsyn and Raymond Aron refer to as ideology, a totalizing theoretical justification that grounds believers’ actions. This point is made clearly and forcefully by Solzhenitsyn in *The Gulag Archipelago*, his gripping account of Stalin’s concentration camps. He argues that:

To do evil a human being must first of all believe that what he’s doing is good, or else that it’s a well-considered act in conformity with natural law. Fortunately, it is in the nature of the human being to seek a *justification* for his actions. . . . Ideology – that is what gives evil-doing its long-sought justification and gives the evildoer the necessary steadfastness and determination. That is the social theory which helps

to make his acts seem good instead of bad in his own and others' eyes, so that he won't hear reproaches and curses, but will receive praise and honors. That was how the agents of the Inquisition fortified their wills: by invoking Christianity; the conquerors of foreign lands, by extolling the grandeur of their Motherland; the colonizers, by civilization; the Nazis, by race; and the Jacobins (early and late), by equality, brotherhood, and the happiness of future generations.⁴²

The trouble, Solzhenitsyn argues, is not necessarily with seeking to justify our actions; instead, it lies in doing so with ideological reasons. In agreement with him on this point is Aron, who notes – as Perry does – that a loss of faith in God leaves human beings in the difficult position of not knowing “whether humanity is progressing towards an atomic holocaust or Utopian peace.”⁴³ Faced with this unsettling question, one might ask, as Abraham Heschel does, “Are we alone in the wilderness of time, alone in the dreadfully marvelous universe, of which we are a part and where we feel forever like strangers? Is there a Presence to live by? A Presence worth living for, worth dying for?”⁴⁴ For Aron,

That is where ideology comes in – the longing for a purpose, for communion with the people, for something controlled by an idea and a will. The feeling of belonging to the elect, the security provided by a closed system in which the whole of history as well as one's own person find their place and their meaning . . . all this inspires and sustains the true believer.⁴⁵

In an attempt to confront this criticism head-on, Perry notes that “There has been an obvious tendency on the part even of the world's ‘great’ religious traditions to tribalism, racism, and sexism – and worse. . . . A self-critical attitude toward one's own tradition is ‘the route to liberation from the negative realities of [the] tradition.’”⁴⁶ This seems to me, however, to be far from a sufficient reply and, in fact, I wonder whether any reply to charges as grave as these can ever be sufficient. Indeed, the vigor and creativity with which the human person has been violated in the name of religion casts serious aspersion on the idea that religion and human inviolability are intimately connected.

That said, it is important that we avoid throwing the baby away with the bathwater; despite the abhorrent and criminal behavior of those who claim to live religiously, it can still be the case that a religious cosmology underpins the idea of human rights. Leo Strauss correctly asserts, after all, that the “*reductio ad Hitlerum*” is fallacious logic, as “A view is not refuted by the fact that it happens to have been shared by Hitler.”⁴⁷ The same can – and, no doubt, ought to – be said of a “*reductio ad religium*,” as many people who consider themselves to be religious are quite loving, charitable, and kind. What exactly does Perry have in mind, then, when he

says that a belief or conviction is a religious one and that it is embedded in a religious vision? He takes as his starting point the haunting question of the meaning of life – which, he acknowledges, may not be one that everyone attempts to answer – and considers the possible solutions. The question might arise, he says, after “a searing encounter with such a common but elemental event as sickness, old age, or death. Another principal occasion is an encounter, whether personal or vicarious, with evil and the terrible, primal suffering that evil causes.”⁴⁸ At moments such as these, when our own mortality comes sharply into focus, there is a strong impulse to wonder whether there exists some greater purpose beyond our own small lives, some ultimate plan for humanity. In the face of encounters such as these, Perry tells us, a person is left “with a feeling that she is, or might be, a stranger, an alien, an exile, homeless, anxious, vulnerable, threatened, in a world, a universe, that is, finally and radically, unfamiliar, hostile, perhaps even pointless, absurd.”⁴⁹ For Perry, there seem to be only two paths open to us when confronted in this manner. The first possibility, for Perry, is to adopt what he calls a religious vision of the universe, “a vision of final and radical reconciliation, a set of beliefs about how one is or can be bound or connected to the world – to the ‘other’ and to ‘nature’ – and, above all, to Ultimate Reality in a profoundly intimate way.”⁵⁰

Two interrelated questions arise from Perry’s definition of a religious vision. The first is one that he seems to invite almost immediately after articulating his position, for he goes on to suggest that an “all-encompassing” worldview, like Marxism, is not a religious one.⁵¹ His reasoning is that Marxism – and presumably other, unnamed worldviews with similar features – “is not grounded or embedded in a vision of the finally or ultimately meaningful nature of the world and of our place in it.”⁵² It is an interesting question, though, whether Marxism is truly incompatible with the sort of religious worldview that Perry has in mind. Indeed, Marxism seems to share a great deal with organized religion and many have argued that Marxism acquired a religious status of its own. As Raymond Aron argues:

What the Christian, without being aware of it, is taken in by in the working-class world and in Marxist ideology are the reminders, the echoes, of a religious experience: proletarians and party militants, like the early Christians, live in anticipation of a new world; they have remained pure, open to charity, because they have never exploited their fellow-men; the class which carries within it the youth of humanity rises up against the corrupt past The Communists, who claim quite unashamedly to be atheists, are nevertheless imbued with a faith: they do not aim exclusively at a rational exploitation of natural resources and of communal life; they aspire to control all cosmic forces and all societies in order to solve the riddle of history and to turn mankind away from meditation on the Fall on to the path of self-sufficiency.⁵³

Marxism, on Aron's reading, is very much a religion unto itself. It has replaced Christianity's righteous believers, whom Marx personally found distasteful, with a different group of oppressed people; in other words, Marxism substitutes the proletariat for the faithful, but offers no substantive distinctions between itself and organized religion. Karen Armstrong makes an argument similar to Aron's: "Even though [Marx] adopted a Messianic view of history that was heavily dependent upon the Judeo-Christian tradition, he dismissed God as irrelevant."⁵⁴ She says that "Since there was no meaning, value or purpose outside the historical process, the idea of God could not help humanity."⁵⁵ Important to note, clearly, is the emphasis on the historical process in this description, as well as in Aron's, for it is history itself that provides Ultimate Meaning within Marxist dogma. In Marx's own words, "Communism is the riddle of history solved, and it knows itself to be this solution."⁵⁶

If Aron and Armstrong are correct about their reading of Marxism, then our second question comes to the fore, namely whether every worldview we can imagine can be classified as religious under Perry's expansive definition. One might wonder, for example, whether Buddhism, a prominent world religion practiced by more than 350 million people, qualifies under Perry's definition of a religious worldview. Indeed, Buddhism has no conception of God per se (despite the idea of *bhakti* (personal devotion) to the Buddha, which is somewhat reminiscent of Christians' devotion to Jesus and which Armstrong notes was developed despite its being in tension with a number of important teachings).⁵⁷ Although Buddhism, then, is quite different from the Christian vision of the universe that Perry sketches, the central teaching "that enlightenment was humanity's proper destiny"⁵⁸ clearly points to the idea of an ultimately meaningful universe and our place in it. As Armstrong argues:

Just as enlightenment and Buddhahood did not involve invasion by a supernatural reality but were an enhancement of powers that were natural to humanity, so too the deified Christ showed us the state that we could acquire by means of God's grace. Christians could venerate Jesus the God-Man in rather the same way as Buddhists had come to revere the image of the enlightened Gautama: he had been the first example of a truly glorified and fulfilled humanity.⁵⁹

Buddhism, then, despite the notable absence of a deity, seems to fit squarely into Perry's definition, as he tells us it should: "Not every religious tradition tells the same story about the way in which the world is ultimately meaningful; often the stories are different, even if sometimes the stories are quite similar."⁶⁰ Buddhists are certainly understood to be religious in the conventional sense and Marxism is generally regarded as having fairly strong religious undertones; at this point, then, it seems that Perry's definition of a religious worldview is expansive enough to

accommodate religious worldviews of very different sorts. Organized religions like Judaism, Christianity, and Buddhism clearly hold human life in the highest esteem and provide a foundation for the idea of human rights; Marxism also places a great deal of emphasis on humanity's role in the historical process and it might even be argued that Marx's concept of human emancipation can ground the idea of human rights. Having considered some conventionally and unconventionally religious worldviews and their connection to the idea of human rights, it will be instructive to look briefly at a worldview that is viewed as anathema both to religion and rights – Martin Heidegger's nihilism – and see how it fares under Perry's definition.

If, as noted above, the first possibility when confronted by questions of our own mortality is to adopt a religious vision of the universe that provides us with Ultimate Meaning, the second possibility could not be more dissimilar, for it is to embrace the path taken by Martin Heidegger. Heidegger's thoughts on metaphysics take Perry's conclusion about the search for Ultimate Meaning as their beginning and, like Perry, arrive before long at Nietzsche and nihilism. For Heidegger, men are constantly led to question the purpose of their existence. Insofar as they are thrust into the Nothing by the fact of their mortality, they must ask, "Why am I?" Every person, he argues, is struck by this question at least once in a lifetime, in a moment of either great joy (when everything becomes focused into love of one thing), despair (when everything is meaningless), or boredom (when nothing is of interest).⁶¹ In each of these three cases, things run together and there ceases to exist a hierarchy of concerns regarding beings in the world. Heidegger suggests that hierarchy requires distance between objects and that, in times such as these, people no longer recognize the possibility of a future outside a particular moment and beings cease to have value. It is at these moments, then, that the question of Being arises for a particular individual. Because of the question's relation to the Nothing, human beings stake their entire existence on its asking – and only in doing so can they live authentic lives. It is to Nietzsche and the problem of nihilism that Heidegger turns, and his project is to show not that the end of metaphysics brings about nihilism but that European philosophy has nihilism at its core. He focuses his attention on Nietzsche because Nietzsche is, for Heidegger, the philosopher who takes metaphysics to its logical end: "Nietzsche had to conceive of nihilism that way [as nihilistic, rather than recognizing its hidden essence] because in remaining on the path and within the realm of Western metaphysics, he thought it to its conclusion."⁶² Important, here, is Heidegger's assertion that Nietzsche is the last in a long line of metaphysical thinkers that can be traced back to Plato, the first to distinguish between Being and beings. Indeed, in positing his idea of the Good, of the Being of beings, Plato sought to answer the question of Being but in doing so relegated Being itself to the status of other beings.⁶³

Central to the advent of nihilism is Nietzsche's well-known and oft-quoted phrase that God is dead. Nietzsche's claim is not that there is no God, but instead that God was once alive – as the Being of all beings – and that we have killed Him.⁶⁴ Heidegger's explanation traces this idea back to Cartesian philosophy which, in positing the world as world picture rather than as creation, replaces God with the individual as the Being of beings. In suggesting the idea of the world picture grounded in the experience of the individual, Descartes asserts that nature is the picture of matter in lawful motion and that man – in learning the laws visible in this picture – can master nature. For Nietzsche, the consequence of the death of God is not so much the Cartesian claim that man takes on God-like power, but that the highest values devalue themselves. Put succinctly, the lack of faith in a god necessitates the acceptance of the total absence of foundations for individual values, beliefs, and thoughts.⁶⁵ In other words, human beings have a great many choices to make, but absolutely no reason to choose any one thing over another. While Nietzsche saw either mass suicide or self-overcoming as the only possible results of this nihilistic manner of thinking, Heidegger is appreciably more hopeful. He makes the claim that to say something has no value is to say that it is not. In attempting to assert the non-existence of Being by thinking the Nothing, however, an individual always makes an assertion of Being because Being introduces through the "is." He notes that "Even when we say simply that the nothing 'is' nothing, we are apparently predicating an 'is' of it and making it into a being; we attribute what ought to be withheld from it."⁶⁶ This is the great use Heidegger sees for nihilism: in attempting to assert that there is no foundation – no Being – human beings are forced by nihilism to raise anew the question of Being.

The things that truly order our lives, according to Heidegger, are mostly invisible to us and only by raising anew the question of Being can we begin to recognize what drives us. For Heidegger, men are in the control of something beyond themselves but have concealed this fact from themselves and are, consequently, unable to see their destiny. This is not to say that an aim for human life is lacking, but that people fail to appreciate that aim. The value of raising anew the question of Being is that it brings man back to a place where Being can assert its control over man in an obvious way and provide him the direction necessary to live an authentic life. It is here, interestingly, that Heidegger and Nietzsche must be separated, as Perry should undoubtedly classify the former but not the latter as a religious thinker. The distinction for Perry – and, therefore, for this project – is clear. For, as Perry says:

To ask if the conviction that every human being is sacred – the conviction that every human being is "inviolable", has "inherent dignity", is "an end in himself", or the like – is inescapably religious is to ask if the conviction can be embedded in ... either an antireligious

cosmology, according to which the world is, at the end of the day, not meaningful but meaningless, or a cosmological agnosticism that neither affirms nor denies the ultimate meaningfulness of the world.⁶⁷

In the end, Heidegger's cosmology is neither an antireligious nor an agnostic one; despite the emphasis it places on nihilism, it actually seems to fit relatively well into Perry's definition of a religious worldview. The problem with Heidegger's religious cosmology is that it leaves open decidedly anti-liberal possibilities, as no value judgment exists regarding Heidegger's great hope, the return to the question of Being. Instead, Heidegger seems content to advise people to wait beside the abyss and follow whatever is disgorged, for good or ill, in an effort to live authentically. The danger is that the product of the abyss is just as likely to be what respectable liberals consider evil as it is what they consider good. In this sense, Heidegger is very much the careful reader of Nietzsche, whose thoughts on the virtues of self-overcoming do not concern themselves with the suffering that might accompany it: "Genuine charity demands sacrifice for the good of the species – it is hard, it is full of self-overcoming, because it needs human sacrifice."⁶⁸

But this is precisely what horrifies Perry, whose quotations make clear his apprehension: "Nietzsche declared: 'Naiveté: as if morality could survive when the *God* who sanctions it is missing! The 'beyond' absolutely necessary if faith in morality is to be maintained.'"⁶⁹ In a world without God, the range of possibilities for human interaction is broad enough that it allows for amoral or immoral action. It is in this sort of world that men might sanction violence against targeted groups and systemically violate the rights of others. It is a world in which stories such as this one, taken from the Iraqi repression of its Kurdish minority, are commonplace:

Some groups of prisoners were lined up, shot from the front and dragged into pre-dug mass graves; others were shoved roughly into trenches and machine-gunned where they stood; others were made to lie down in pairs, sardine-style, next to mounds of fresh corpses, before being killed; others were tied together, made to stand on the lip of the pit, and shot in the back so that they would fall forward into it – a method that was presumably more efficient from the point of view of the killers. Bulldozers then pushed earth or sand loosely over the heaps of corpses.⁷⁰

In such a world, the idea of human rights, according to Perry, is both unintelligible and unpersuasive.

If human beings want a world in which human rights are respected, Perry would argue, they must eschew the path of nihilism that Nietzsche and Heidegger are willing to consider. A religious worldview must provide people with more than just meaning, for Heidegger's seems to promise

that. For Perry, the worldview must be both religious and liberal, no mean feat, as it must provide people with an answer not only to the question of why we ought not to destroy one another, but why we ought to go so far as to love one another:

The answer . . . is that the Other (the outsider, the stranger, the alien), too, no less than oneself and the members of one's family or of one's tribe or nation or race or religion, is a "child" of God – God the creator and sustainer of the universe, imag(in)ed, analogically, as a loving "parent" – and therefore a "sister"/"brother"⁷¹

It is in caring about other people, in treating them as brothers and sisters, that we live a truly meaningful human life. Those who think otherwise are, for Perry, "no less in the grip of a pathology of estrangement than if [they] were to reject that an important constituent of [their] own well-being is concern for the well-being of [a] child, or spouse, or parent."⁷²

That said, it is important to note that Perry's Nietzsche is a sort of philosophical bogeyman. Perry has been, in my estimation, uncharitably selective in his reading; indeed, all of the quotations that Perry employs come from Nietzsche's *Will to Power*, an infamous collection of often incomplete notes and ideas published after his death. As Walter Kaufmann notes:

These notes were not intended for publication in this form, and the arrangement and the numbering are not Nietzsche's. Altogether, this book is not comparable to the works Nietzsche finished and polished, and we do him a disservice if we fudge the distinction between these hasty notes and his often gemlike aphorisms.⁷³

There is a great deal more to Nietzsche than the death of God and the destruction of morality, though I will not ultimately argue with Perry's characterization of the basic problem that Nietzsche presents for the idea of human rights. In many ways, however, Nietzsche puts forward a much more nuanced critique of liberal human rights and the culture that spawned them. We turn, then, to a more robust discussion of nihilism and to Nietzsche's postulation of the death of God, which Perry views, it seems, as his antipodes.

Nietzsche and the death of God

For Nietzsche, the problem of modern society lies in the sense of security that liberalism fosters in its citizens. Modern men, he seems to suggest, might be nothing more than happy slaves, convinced by rationalism that they ought to continue their work because progress makes each day better than the last. An answer to this problem, Nietzsche asserts, can be found in an examination of man's use of history to serve the goals of the present.

People have the tendency to overemphasize the importance of the past and become absorbed in a love of history. Nietzsche goes so far as to poke fun at those who can find fault with everything associated with the present.⁷⁴ On the other hand, it is just as easy to ignore the past and lose sight of everything by focusing solely on day-to-day living. One overzealous approach is as harmful as the other. He is quick to point out that neither extreme can provide an answer for how men ought to live. Instead, it is a blending of the two that can bring people closest to their target. History, according to Nietzsche, must be considered in light of the present; if it fails to challenge or speak to the experience of modernity, we have used it improperly.⁷⁵ In this way, there can be no universal truth about history. Indeed, the strongest people must be able to synthesize history as plants use sunlight. These strong men will mold and shape the past into a form that illuminates the present in a useful manner for them; what cannot be used is simply forgotten. “The stronger the roots of the inmost nature of a man are, the more of the past will he appropriate or master.”⁷⁶ Those who are not gifted with this ability may be permanently traumatized, paralyzed with fear or anxiety, and unable to move forward after a harmful experience.⁷⁷ These people, unable to close a horizon around themselves that leaves the forgotten outside, cannot continue to exist as the strong do. As Nietzsche notes, “*only the strong personalities can endure history; the weak are completely extinguished by it.*”⁷⁸

The strong man, for Nietzsche, has no repression in his soul and is more a force of nature than a human being. He is filled with the uncorrupted joy of mastership, of being the best. The weak man, however, is forced to follow the orders of the strong and repress his own passions and appetites. This daily repression leads to a powerful resentment that is relieved only through an imagined revenge encapsulated in a doctrine under which the meek supposedly inherit the earth. As Nietzsche argues:

Dante, I think, committed a crude blunder when, with a terror-inspiring ingenuity, he placed above the gateway of his hell the inscription “I too was created by eternal love” – at any rate, there would be more justification for placing above the gateway to the Christian Paradise and its “eternal bliss” the inscription “I too was created by eternal *hate*” – provided a truth may be placed above the gateway to a lie! For *what* is it that constitutes the bliss of this Paradise?

We might even guess, but it is better to have it expressly described for us by an authority not to be underestimated in such matters, Thomas Aquinas, the great teacher and saint. “*Beati in regno coelesti,*” he says, meek as a lamb, “*videbunt poenas damnatorum, ut beatitudo illis magis complaceat.*”⁷⁹

Although this religious belief justifies their suffering, Nietzsche asserts that the knowledge offered by religion serves only to keep the truth about the

world hidden from weak men. This fraudulence underpins Nietzsche's criticism of both Christianity and morality, as priests and the rulers they buttress seek to further consolidate their power by asserting the concept of an effectual truth which can only be discovered through blind faith. This sort of easy knowledge, Nietzsche argues, is precisely what weak men hope for: "‘Enlightenment’ enrages: for the slave wants the unconditional; he understands only what is tyrannical."⁸⁰ For Nietzsche, two interesting questions arise when religious truth is shown to be a falsehood. First, how will humanity deal with the realization that religion is man-made and out-moded? Subsequently, what will become of humanity once morality – that pillar that religion itself fosters – is also shown to be its own construct?

It is clear to Nietzsche, at the close of the nineteenth century, that man has arrived at a philosophical crossroads. The first path leads to nihilism resulting from the failure of humanity to recover from its loss of belief in religion and rationalism. The second, however, is the path of the Overman and it winds through what Nietzsche calls a revaluation of all values. He argues that:

Life itself is *essentially* appropriation, injury, overpowering of what is alien and weaker; suppression, hardness, imposition of one's own forms, incorporation and at least, at its mildest, exploitation – but why should one always use those words in which a slanderous intent has been imprinted for ages?⁸¹

To recognize that the strong individual – not the common man or God – is the creator of morality is the cornerstone of this second path. Learning that values neither arise from a universal truth nor are God-given leads to the understanding that they are created by human desires. "The noble type of man experiences *itself* as determining values; it does not need approval; it judges, 'what is harmful to me is harmful in itself'; it knows itself to be that which first accords honor to things; it is *value-creating*."⁸² Nietzsche, then, does not preach the destruction of all morality as Perry fears; he encourages the creation – by strong individuals – of the values that are necessary for their lives. Of course, Nietzsche is no democrat and only a certain sort of person can undertake this sort of constructive work. "In the end," he says, "it must be as it is and always has been: great things for the great, abysses for the profound, nuances and shudders for the refined, and, in brief, all that is rare for the rare."⁸³ For Nietzsche, equality is a construct to keep the strong enslaved to the weak. In its name, most geniuses have been labeled dangerous or insane, killed or institutionalized. And this is not particularly surprising, as Nietzsche asserts that the production of genius will necessitate suffering and that, most often, the geniuses will not be the sufferers. He asserts that "One must shed the bad taste of wanting to agree with many. 'Good' is no longer good when one's neighbor mouths it. And how should there be a

‘common good’! The term contradicts itself: whatever can be common always has little value.”⁸⁴

This repudiation of the ideal of a common good is one that would terrify someone like Thomas Hobbes, who argues that men collectively give up their power to a sovereign because they desire self-preservation above all else. According to Nietzsche, this is nonsensical: weak men are certainly willing to give up the meager amount of power they have in nature, but strong men must be subdued in order to accomplish the goal of *Leviathan*. Indeed, if men exist in nature with no other purpose than the satisfaction of their individual appetites, the strong should have little trouble following as many of their divergent drives and passions as possible, all at the expense of the weak. The weak, then, desperately need to create and maintain the commonwealth to ensure their own survival, irrespective of the cost. They do so, first, by building resentment against the strong through the doctrine of eternally-rewarded meekness taught by the purveyors of religion. Then they assert the notion of equality, as Hobbes famously does, claiming that the weakest man – or a group of them – can eventually kill even the strongest.

While this statement of equality is not in dispute, Nietzsche argues that what actually separates the strong from the weak is that the former have no fear of death. They have come to terms with the wisdom of Silenus: “What is best of all is utterly beyond your reach: not to be born, not to *be*, to be *nothing*. But the second best for you is – to die soon.”⁸⁵ The strong live solitary and instinctual lives, by the rules of nature rather than artificially created maxims, fulfilling passion after passion until they die. “For solitude is a virtue for us, as a sublime bent and urge for cleanliness which guesses how all contact between man and man – ‘in society’ – involves inevitable uncleanness. All community makes men – somehow, somewhere, sometime ‘common.’”⁸⁶ While a fundamental falsehood is required to remove these strong individuals from their natural state, this move is not necessarily bad in itself. It is, for example, easy to imagine a society – like that of the ancient Greeks – that enslaves some people in order to better produce a race of artistic men in touch with the world as it is. The trouble arises when just the opposite occurs, when the mechanism by which the weak are able to continually subdue the strong is the perpetuation of the Socratic principles that so infuriate Nietzsche. By privileging the rational over the instinctual, society begins to reprioritize toward more sterile ends and genius is soon entirely suppressed.

This is the corrupted world in which – centuries earlier – Hobbes provides a quasi-scientific method for tricking and destroying genius in order to better establish a regime that preserves the lives of the thoughtless and artless masses. Hobbes’ commonwealth – and the modern liberal society that eventually arose from it – has nothing to offer the strong man. Trapped within its confines, it is only a matter of time before his sense of loss becomes too great to bear. He is that revolutionary, then, that rages at

the sovereign until his detention or execution at the behest of the terrified citizenry. Unlike the opinion presented in *Leviathan*, however, Nietzsche suggests that these revolutionaries are the only men of sufficient strength and vision capable of reorganizing society in such a way that the production of genius becomes its goal. If the revolutionaries succeed in their violent uprising, the lives of weak men might indeed be as “poore, nasty, brutish, and short”⁸⁷ as they would be in the state of nature. The difference, for Nietzsche, is that they will have served a higher purpose by living and dying in a society that produces great genius. In other words, a slave in Athens is far better off than any modern man.

Nietzsche, then, is not simply the brash critic of Christianity and morality that Perry cites disapprovingly. He is one who seeks a reevaluation of all values, who laments the passing of an age when genius was cultivated and weakness denigrated, and who deeply resents the gentle liberal virtue of tolerance. An aristocrat at heart, Nietzsche decries the fictional notions that all men are created equal and should act toward one another in a spirit of brotherhood. The truth about mankind, he argues, accords with the wisdom of Silenus – and human life, therefore, is valuable only insofar as it prepares the way for the Overman. Warfare, suffering, and death are grist for the Nietzschean mill because these call forth all that is great and powerful about men to the detriment of all that is weak and facile. This is the depth of Nietzsche’s critique of liberalism and the idea of human rights, one with which Perry does not even begin to contend because he becomes transfixed by the idea of Nietzsche the Antichrist who scorns the notion of morality. In fact, Nietzsche mainly vilifies the slave morality that begins with resentment and imaginary revenge; in the end, he dreams of a reevaluation of all values that will bring forth a new morality, one that is simultaneously inspiring and terrifying to those who take his writing seriously.

Conclusion

It is no accident, Werner Dannhauser tells us, that Nietzsche and Nazism are so commonly and closely linked. He writes that:

The problem of Nietzsche’s connection with fascism is unfortunately not resolved by claiming, as many interpreters of Nietzsche are prone to do, that Nietzsche was no fascist, that he was a violent critic of German nationalism, and that he would have loathed Hitler. These things are undoubtedly true, and uttering them shows the absurdity of a crude identification of Nietzsche’s doctrines with Hitler’s ravings. . . . But the fact remains that in various ways Nietzsche influenced fascism. Fascism may have abused the words of Nietzsche, but his words are singularly easy to abuse. Nietzsche was an extremist, and no man was more gifted than he in making an extreme view seem appealing by presenting it with great audacity and eloquence.⁸⁸

And, for Michael Perry, much of the connection between the totalitarian, rights-abusing regimes and the theorists from whom they drew their inspiration can be explained by the absence and abuse of the idea of a religious cosmology in Nietzsche's writing. Such a view, I have argued, is overly simplistic and encourages a critique that fails to deal with the complexity of Nietzsche. That said, I think Dannhauser's argument is a compelling one: Nietzsche was clearly abused by the Nazis, but the language he frequently employs *is* singularly easy to abuse. As he forcefully points out:

A man who counsels men to live dangerously must expect to have dangerous men like Mussolini heed his counsel; a man who teaches that a good war justifies any cause must expect to have this teaching, which is presented half is jest but only *half* in jest, to be abused. Nietzsche praises cruelty and condemns pity without reflecting sufficiently on whether man must really be advised to be more cruel than he is, or what the effect of such a view will be on cruel men."⁸⁹

Perry's consideration of *Will to Power* as the authentic Nietzsche is undoubtedly unfair, as it fails to present much of what is praiseworthy about him: "Nietzsche was a man with a noble vision of man's future. His own delicacy, integrity, and courage shine through his writing. He was also free of the crude racism which was to be an important element of fascism, and he had only contempt for political anti-Semitism."⁹⁰ Of course, I have attempted to show that a more complete consideration of his work does not bring to light a more democratic or pacific Nietzsche. In looking carefully at Nietzsche, then, we should not be surprised that religious thinkers and human rights theorists find much to dislike, and that those who set themselves against both religion and rights find much to praise.

Though he likely would not have supported the Nazis, Nietzsche's philosophical critique of rights and religion was certainly used to prop up their repressive ideology. To my mind, this makes Perry's project all the more troubling, as he argues that *only* a religious cosmology can ground the idea of human rights. In a pluralistic world – one in which most people do not hold the same religious worldview and many hold worldviews that would not fit within Perry's definition – it seems to me that a wider framework is needed, not a narrower one, to ground the idea of human rights. This is, of course, quite different from showing that Perry is incorrect about religion providing a compelling grounding for human rights, and I do not think he is. As I have shown, the language of rights can certainly find a solid foundation in many of the world's great religious texts, especially – as Perry notes – the Christian Gospels. The language of love and respect for the other, as well as of the equality of persons, provides a strong justification for the belief that people ought to be treated with respect and compassion, and that they ought not to be abused or otherwise

harm. As this chapter has also demonstrated, however, religious people do not have the best track record when it comes to respecting human rights. Indeed, from the biblical destruction of the Amalekites to the Spanish Inquisition to the Taliban government of Afghanistan, some of the most terrible violations of human rights have occurred in the name of religion. These failings of organized religion should not necessarily be seen as damaging beyond repair Perry's thesis, as these are certainly misuses of a theory in much the same way that Nazism abused Nietzsche's thought. They do, however, constitute a serious hurdle that, I have argued, Perry fails to overcome in his argument in favor of the intimate connection between religion and rights.

Having said all this, the question that remains to be considered in the chapters that follow is one that Perry poses at the outset of *The Idea of Human Rights*: "Must we conclude," he asks:

that the idea of human rights is ineliminably religious, that a fundamental constituent of the idea, namely, the conviction that every human being is sacred – that every human being is 'inviolable', has 'inherent dignity', is 'an end in himself', or the like – is inescapably religious?"⁹¹

For Perry, the answer is clear and affirmative, but for a number of other theorists – like Alan Gewirth, Ronald Dworkin, and Richard Rorty – to whom we will turn in the coming chapters, the answer is quite the opposite. Our task, then, is to adjudicate this dispute with a view to determining whether a religious worldview is needed to protect the concept of rights from Nietzsche's atheistic assault or whether a non-religious grounding can also provide us with compelling responses to those who would deny or disregard the idea of human rights.

2 The possibility of non-religious human rights

Alan Gewirth and the Principle of Generic Consistency

There is a well-known and often-quoted passage in Aleksandr Solzhenitsyn's *The Gulag Archipelago* in which the author makes a striking and controversial claim about his experience in the Soviet work camps. He says:

If only it were all so simple! If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts through the heart of every human being. And who is willing to destroy a piece of his own heart? . . . Confronted by the pit into which we are about to toss those who have done us harm, we halt, stricken dumb: it is after all only because of the way things worked out that they were the executioners and we weren't.¹

Primo Levi, a survivor of the Nazi Holocaust, disagrees vehemently with Solzhenitsyn's claim. In *The Drowned and the Saved*, Levi says:

I do not know, and it does not much interest me to know, whether in my depths there lurks a murderer, but I do know that I was a guiltless victim and I was not a murderer. I know that the murderers existed . . . and that to confuse them with their victims is a moral disease or an aesthetic affectation or a sinister sign of complicity; above all, it is a precious service rendered (intentionally or not) to the negators of truth.²

This debate between survivors of history's two most brutal regimes has captured the imagination of a wide variety of human rights theorists. The passages, in whole or in part, appear in numerous books and can now be found on a wide variety of Internet websites; something about them strikes a chord with us and encourages us to enter into the debate. As Jonathan Glover points out, "One question about those who ran the Gulag or the Nazi genocide is about the rest of us too. Could *anyone* have done these things?"³

The haunting experience of the atrocities of the twentieth century has produced a greater understanding of humanity's dark side, through the works not only of Solzhenitsyn and Levi, but also Arthur Koestler, Milan Kundera, Elie Wiesel, and countless other authors' personal narratives and fictionalized accounts. An encounter with this body of literature – or, more powerfully, with the regimes themselves – directly informs much of contemporary rights theory, as philosophers, legal scholars, and politicians have attempted to come to terms with all that we have learned about ourselves and to keep our dark side in check. Glover is particularly clear on this point; he says, “If persuaded that an otherwise convincing ethical theory could justify the Nazi genocide, I should without hesitation give up the theory. In reconstructing ethics, revulsion against these things which people have done has a central place.”⁴ The century's most repressive regimes drew inspiration – however misguided – for their doctrines of racial purity and proletarian dictatorship from the foundations provided by the philosophy of Nietzsche and Marx (among others). It is, then, to philosophy that we turn for an answer to the claim that rights necessarily serve the interests of one group at the expense of another (the weak against the strong, for Nietzsche, and vice versa for Marx). As Alan Gewirth notes:

In a century when the evils that man can do to man have reached unparalleled extremes of barbarism and tragedy, the philosophic concern with rational justification in ethics is more than a quest for certainty. It is also an attempt to make coherent sense of persons' deepest convictions about the principles that should govern the ways they treat one another.⁵

In this chapter, I examine Gewirth's argument for a non-religious foundation for the idea of human rights as a possible response to Michael J. Perry's claim

that the idea of human rights is indeed ineliminably religious, that a fundamental constituent of the idea, namely, *the conviction that every human being is sacred – that every human being is “inviolable”, has “inherent dignity”, is “an end in himself”, or the like* – is inescapably religious.⁶

In the first section, I look at Gewirth's reasons for constructing a theory, namely that existing theories are fundamentally flawed and leave the idea of human rights without a logically consistent foundation. The second section then considers Gewirth's own claims in detail. For the purposes of this chapter, Gewirth's argument will be thought of as having two major components, though in his own text it is actually broken down into some fifteen parts.⁷ We will, of course, look carefully at each of these steps in his

argument, but for the purposes of critique, it will help to think of each step as belonging to one of these two major components. The first of these is Gewirth's notion that:

every agent logically must hold or accept that he has rights to freedom and well-being as the necessary conditions of his action, as conditions that he must have; for if he denies that he has these rights, then he must accept that other persons may remove or interfere with his freedom and well-being, so that he may not have them; but this would contradict his belief that he must have them.⁸

And the second is that “the agent logically must accept that all other prospective purposive agents have the same rights to freedom and well-being as he claims for himself.” These components are used to construct the frame of Gewirth's argument for the Principle of Generic Consistency (PGC), a theory of non-religious universal human rights. Having looked at his critique of numerous other theories, as well as at his own argument, the third section offers a critique of Gewirth's PGC, concluding that the problem for Gewirth's theory is that it relies on the notions, first, that we have a meta-desire not to contradict ourselves and, second, that we are unable to find persuasive justifications for our behavior that might allow us to avoid self-contradiction. If one is not troubled by charges of self-contradiction or, as is more often the case, one does not recognize that one's victim is as much a human being as oneself, Gewirth's theory will not seem particularly persuasive. Ultimately, my critique of Gewirth is centered around the idea of justification. To my mind, a compelling grounding for human rights must do more than achieve logical coherence in order for it to have justificatory weight; I argue for the necessity of *inclusivity*, *persuasiveness*, and *practicality* to any foundational theory of human rights.

Gewirth's case against previous theories

If there could be only one thing said about Alan Gewirth, it should be that he is thorough. Thanks to his meticulous work, we are able to examine – in some detail – a number of non-religious theories that he feels are unable to successfully defend the idea of human rights against its critics. In sorting through these theories, which range from that of Thomas Jefferson to the Universal Declaration of Human Rights and H.L.A. Hart to John Rawls, Gewirth provides a comprehensive critique of those who have attempted his project before him. In order to be considered successful, Gewirth suggests, an argument for human rights must specify what a person has a right to; in addition, it must be universally applicable and must incorporate the principle of equality. He begins with the intuitionist argument made by Thomas Jefferson and again by Robert Nozick: “Jefferson held it to be ‘self-evident’ that all humans equally have certain rights, and Robert

Nozick has peremptorily asserted that ‘individuals have rights.’¹⁰ For Gewirth, these sorts of claims fail immediately, for prudential as much as for theoretical reasons:

Such assertion is not, of course, an argument for the existence of human rights; it would not serve at all to convince the many persons throughout history who have had different intuitions on this question. Hence, the answer fails to satisfy *the condition of providing an argument*.¹¹

He turns, then, to a number of theorists who – in his view – provide reasoned argumentation for the logic of their positions and tries to demonstrate the ways in which they do not satisfy his three necessary conditions. Based on his critique of Jefferson and Nozick, it seems to me that Gewirth must also be looking for arguments that can “convince the many persons throughout history who have had different intuitions” about whether or not human rights exist, and so I include *persuasiveness* as another necessary condition.

Gewirth next quickly dispenses with what he calls the formal principle, namely that people have a right to be treated equally unless some reason can be determined for treating them unequally. He does so by pointing out, first, that the formal principle fails to specify what ought to count as a good reason for treating people unequally; “and, of course, very many differences, including intelligence, sex, religion, color, economic class, have been held to be thus relevant.”¹² Further, he notes that the formal principle can result in both egalitarianism and inegalitarianism, which means that it “fails to satisfy . . . *the condition of determinacy*, since it may serve to justify mutually opposed allocations of rights.”¹³ Gewirth then turns to a consideration of Joel Feinberg’s argument that rights arise from interests. The trouble with Feinberg’s assertion – apart from what Gewirth calls “the murkiness of the concept of ‘interests’”¹⁴ – is that not every interest automatically necessitates a right to fulfill that interest. The criminal certainly has an interest in committing his crime, for example, but he does not thereby derive a right to do so. More than that, Gewirth asserts that animals, as well as humans, have interests and that humans have unequal interests; Feinberg’s interest principle offers no justification for the idea that rights belong only to humans or that they belong to all human beings equally.¹⁵ An argument might easily be made that some people deserve more than others or have more of a right to fulfill their interests than do others. Nietzsche, for example, makes precisely this sort of argument.

From Feinberg’s argument, Gewirth turns to a similar theory of interests offered by William Frankena, who “held that humans ‘are capable of enjoying a good life in a sense in which other animals are not [which] justifies the *prima facie* requirement that they be treated as equals.’”¹⁶ The trouble, here, is that Frankena falls into the trap of the naturalistic fallacy,

arguing that an “ought” can be derived from an “is.” Human beings may, in fact, be able to enjoy a good life in the way that Frankena asserts; the recognition of this fact of human existence, however, does not require that humans be treated in a certain way. Next, Gewirth turns to Susan Moller Okin and her strategy of defining “a human right as ‘a claim to something (whether a freedom, a good, or a benefit) of crucial importance for human life.’”¹⁷ Gewirth’s argument against Okin – and, indeed, against all definitional approaches – is that defining human rights as claims to important goods does not prove that these rights are actually necessary or that they ought to be fulfilled. In addition, it might be that other rights theorists (or anti-rights theorists) simply disagree with the definition that Okin puts forward or with the goods that she considers to be crucial.

The final three theories that Gewirth considers receive much greater detail in their explication and ultimate rejection. The first “is H.L.A. Hart’s famous presuppositional argument. He says: ‘If there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.’”¹⁸ The first problem, clearly, involves the way in which Hart sets up his claim. Precisely because his argument begins with a presupposition about the existence of moral rights, someone might just as easily suggest that there are no moral rights at all. Hart has not demonstrated that there are moral rights; he has simply put forward an “if, then” sort of suggestion. A second difficulty with Hart’s argument is the same one that snared Feinberg, which is the unquestioned assumption of equality. As Gewirth points out:

If special moral rights are to be used to show that there is an *equal* right of *all* men to be free, then such universal equality must be found in the special rights themselves. But Hart has not shown that all men equally derive rights from the transactions of promising, consenting, and imposing mutual restrictions. He presupposes, without any justificatory argument, the very egalitarianism he seeks to establish. A believer in basic human inequality, such as Nietzsche, would deny that all men are equal with regard to the special rights. Hence, Hart’s argument does not establish the egalitarian universalism he upholds.¹⁹

Hart’s argument, then, falls far short of satisfying the conditions necessary for justifying human rights.

Having demonstrated these shortcomings, Gewirth turns to the famous argument put forward by John Rawls in *A Theory of Justice*. Rawls, he notes, argues

that if the constitutional structure of a society were to be chosen by persons who are “in an initial position of equality” and who choose from behind a “veil of ignorance” of all their particular qualities, the

principles of justice they would choose would provide that each person must have certain basic, equal rights.²⁰

A debate has been raging for more than thirty years about these key features of Rawls' theory, and Gewirth joins philosophers like Michael Sandel and Robert Nozick in the anti-Rawls camp. Ultimately, he argues that Rawls' premise is both a false and circular one. He agrees, first, with Nozick's critique of the concept of an original position, writing that:

persons are not in fact equal in power and ability, nor are they ignorant of all their particular qualities. Hence, to assume that they are . . . and to base on this equality and ignorance one's ascription of equal rights, is to argue from a false premise.²¹

He goes on to also agree with Sandel's critique, arguing that:

the total ignorance of particulars that Rawls ascribes to his equal persons has no independent rational justification. Hence, no reason is given as to why actual rational persons, who know their particular characteristics, should accept the equality of rights that is based on their assumed ignorance.²²

Finally, Gewirth maintains that these problems with the idea of the original position highlight the circularity of Rawls' argument, as its ultimately egalitarian result can only be attained by building false conditions of equality into his original position.

Having dispensed with Rawls' theory of justice, equality, and rights, Gewirth turns to the argument put forward by the drafters of the Universal Declaration of Human Rights. He argues that there are a number of problems with the assertion of human dignity upon which the Declaration bases its rights. The first problem, he notes, is that there is simply no way to empirically assess the claim that all men have inherent dignity. A second problem, to which he devotes considerably more time, "is that the two expressions, 'A has human rights' and 'A has inherent dignity' may seem to be equivalent, so that the latter simply reduplicates the former."²³ But, he continues, if "the two expressions are thus equivalent in meaning, the attribution of dignity adds nothing substantial to the attribution of rights, and someone who is doubtful about the latter attribution will be equally doubtful about the former."²⁴ On this point, I will state a simple disagreement with Gewirth, for he makes the same sort of argument for which he critiques Hart above. The claim that the expressions "A has human rights" and "A has inherent dignity" are equivalent in meaning is presented – by Gewirth – not as being true but as seeming to be true. Further, he puts forward the presuppositional argument that *if* they are equivalent, *then* the idea of inherent dignity adds nothing to the claim of human rights.

Nowhere, though, does Gewirth actually suggest that the two statements are, in fact, equivalent.

While I do not find Gewirth's appraisal of the Universal Declaration to be as compelling as his other critiques – a number of which are also a bit problematic – I remain impressed by and indebted to him for his examination of such a wide variety of contemporary non-religious theories of human rights. Having considered them all in some detail and found them lacking in one respect or another, it remains to Gewirth to construct his own argument for a non-religious basis for the idea of human rights. Indeed, he goes to great lengths to outline what he sees as the most compelling affirmative answer “to the problem of whether some supreme moral principle can be rationally justified.”²⁵ His answer, the Principle of Generic Consistency, is a fascinating attempt to ground the idea of human rights in what he refers to as the generic features of action, namely voluntariness and purposiveness (or, more simply, freedom and intentionality). The theory begins, Gewirth tells us, with a difficult question: “How, then, can it be shown that from such morally neutral premises there follow determinate, normatively moral conclusions about the necessary content of the supreme principle of morality?”²⁶ Perry contends that:

there is something about each and every human being, simply as a human being, such that certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.²⁷

While Gewirth does not disagree with Perry on this point, his problem is that “it is not the case that humans are born having rights in the sense in which they are born having legs. At least, their having legs is empirically verifiable, but this is not the case with their having moral rights.”²⁸ What is required, for Gewirth, is some manner in which we might verify that we have these rights and it is to that task that he turns.

The Principle of Generic Consistency

While it might not be immediately clear where our rights come from just from looking at us, Gewirth is confident that there is a distinctive feature of all human beings from which human rights stem. While Perry argues that it is our sacredness, our connection to God, that grounds our human rights, Gewirth would undoubtedly note that this theory runs into one of the problems he recognized with the Universal Declaration. That is, it is not possible to empirically assess Perry's claim; human sacredness is simply not observable. For Gewirth, an observable feature upon which we can ground the supreme moral principle is the distinctly human ability to plan and execute an action. Upon this bedrock is founded his theory of human

rights, one which is thoroughly non-religious and can be critically assessed. In his own words:

because of its generic features, action has what I shall call a “normative structure,” in that evaluative and deontic judgments on the part of agents are logically implicit in all action; and when these judgments are subjected to certain rational requirements, a certain normative moral principle logically follows from them. To put it otherwise: Any agent, simply by virtue of being an agent, must admit, on pain of self-contradiction, that he ought to act in certain determinate ways.²⁹

From this beginning, Gewirth proceeds to lay out the logic of his theory. At the outset, I mentioned that this chapter would treat Gewirth’s argument as though it consisted of two main parts even though Gewirth himself puts forward some fifteen steps, each of which is carefully connected to its predecessor as well as its successor. In what follows, I will look at each of these steps before arguing for the importance of the two steps upon which my critique – in the next section – will be based. At the outset, Gewirth claims, as noted above, that every action is characterized by two generic features, voluntariness and purposiveness. He elaborates instructively on this point:

By an action’s being voluntary or free I mean that its performance is under the agent’s control in that he unforcedly chooses to act as he does, knowing the relevant proximate circumstances of his action. By an action’s being purposive or intentional I mean that the agent acts for some end or purpose that constitutes his reason for acting; this purpose may consist in the action itself or in something to be achieved by the action.³⁰

There are, of course, a number of arguments against both of these generic features of action and Gewirth proceeds to tackle the most demanding of them in turn. With regard to the feature of voluntariness, he considers the problems of both direct and indirect compulsion, as well as of determinism. In the first two situations, Gewirth maintains that when one acts under compulsion, one cannot properly be said to have made a choice and so voluntary action precludes forced choice. His argument against determinism is that:

Choices may indeed be extensively affected by previous psychological conditioning. But such conditioning may take a variety of forms. Even when strong emotional factors are invoked, these and other conditioning influences need not be exhaustive determinants of a person’s choices; he may still reflectively consider various reasons for alternative actions and choose among them on the basis of such

consideration. It is when a person controls his behavior by such unforced choices based on his own informed reasons that his action is fully voluntary.³¹

Having discussed voluntary action, he proceeds to purposiveness and the objection that one might act solely out of a sense of obligation, without trying to fulfill any desire or purpose of one's own. Gewirth's response is that the idea of a desire implicit in the objection is not as robust as his own. He says:

It is important to remember that "wanting" has not only an inclinational or hedonic sense, but also an intentional sense. In the inclinational sense, to want to do X is to take pleasure in doing X or to like doing X; but in the intentional sense, to want to do X is simply to intend to do X, to regard one's doing X as having some point or purpose even if one doesn't like doing it.³²

One might very well take pleasure in doing X, but for Gewirth's argument the most important feature of purposive action is that one simply intends to do X. That said, Gewirth takes care to note that one ultimately engages in X because one feels positively about the end to which X is directed: "For even if he regards his action as morally indifferent or as not making any difference on some other specific criterion, by the very fact that he aims to do the action he has a pro-attitude toward doing it and hence a positive or favorable interest in doing it."³³

In laying out these generic features of action, Gewirth has accomplished the first two steps in his argument for voluntary and purposive action as the foundation of human rights. In order to make sense of these two steps, as well as to see how they relate to the generic features of action explicated above, Gewirth carefully describes his agent:

When he performs an action, he can be described as saying or thinking:

- (1) "I do X for end or purpose E."

Since E is something he unforcedly chooses to attain, he thinks E has sufficient value to merit his moving from quiescence to action in order to attain it. Hence, from his standpoint, (1) entails

- (2) "E is good."

Note that (2) is here presented in quotation marks, as something said or thought by the agent A. The kind of goodness he here attributes to E need not be moral goodness; its criterion varies with whatever

purpose E the agent may have in doing X. But what it shows already is that, in the context of action, the ‘Fact–Value gap’ is already bridged, for by the very *fact* of engaging in action, every agent must implicitly accept for himself a certain *value*-judgment about the value or goodness of the purposes for which he acts.³⁴

With these two steps carefully explained, Gewirth moves forward with his argument. As we have seen, (1) and (2) are not presented as being free from controversy; however, their articulation is far simpler than (3) through (12), which contain positive arguments and counterfactuals, and which I will fold into the first of what I consider the two main components of Gewirth’s theory.

Having established that agent A always acts for a purpose that she regards as good, Gewirth makes the claim that – in order to do so – she must accept “(3) ‘My freedom and well-being are necessary goods.’”³⁵ This follows, he argues, from (2) because “freedom and well-being are the necessary conditions of action and of successful action in general.”³⁶ The reasoning behind this step in his argument is that every action is characterized, as we recall, by the generic features of voluntariness (or freedom) and purposiveness; when extended to include successful action rather than simply action-as-such, purposiveness “becomes a more extensive condition which I shall call *well-being*.”³⁷ He explains this move from the general condition of purposiveness to the more specific notion of well-being in a bit more detail as follows: “freedom and well-being are the most general and proximate necessary conditions of all his purpose-fulfilling actions, so that without his having these conditions his engaging in purposive action would be futile or impossible.”³⁸ If one is performing any action at all, in other words, one must have freedom and well-being. Put another way, “well-being consists in having the various substantive conditions and abilities, ranging from life and physical integrity to self-esteem and education, that are required if a person is to act either at all or with general chances of success in achieving the purposes for which he acts.”³⁹ Therefore, he writes, “Every agent must regard these capabilities of action not only as goods but also, because they are required for all purposive action, as necessary goods.”⁴⁰ And, as Gewirth tells us, (3) “may also be put as (4) ‘I must have freedom and well-being,’ where this ‘must’ is a practical-prescriptive requirement, expressed by the agent, as to his having the necessary conditions of his action.”⁴¹ From (3) and (4), he argues, comes “(5) ‘I have rights to freedom and well-being.’”⁴² which, for our purposes, is the most important step that Gewirth makes to this point.

It is this fifth step, where Gewirth introduces the idea of rights, that causes a good deal of controversy; it will, consequently, be examined in far greater detail in the third section. For the present, it will suffice to explain how Gewirth moves from (4) to (5), as well as how he proceeds from (5) onward to the rest of his argument. First, Gewirth argues that “Since the

agent regards as necessary goods the freedom and well-being that constitute the generic features of his successful action, he logically must also hold that he has rights to these generic features, and he implicitly makes a corresponding right-claim."⁴³ In claiming these rights to freedom and well-being,

The agent holds that other persons owe him at least noninterference with his freedom and well-being, not because of any specific transaction or agreement they have made with him, but on the basis of his own prudential criteria, because such noninterference is necessary to his being a purposive agent.⁴⁴

Having put forward these rights and explained the correlative duty that arises from claiming them, Gewirth must demonstrate that an agent must make such a claim. This is demonstrated by examining what it would mean to deny (5). For if one were to deny (5), he maintains, one must also deny "(6) 'All other persons ought at least to refrain from removing or interfering with my freedom and well-being.'"⁴⁵ Of course, "By denying (6), he must accept (7) 'It is not the case that all other persons ought at least to refrain from removing or interfering with my freedom and well-being.'"⁴⁶ One ought not accept (7), clearly, because it necessitates acceptance of "(8) 'Other persons may (i.e. It is permissible that other persons) remove or interfere with my freedom and well-being.'"⁴⁷ Accepting (7) and (8) causes the greatest amount of trouble for any agent who sought to avoid claiming the rights laid out in (5). For, in accepting (8), "he must accept (9) 'I may not (i.e. It is permissible that I not) have freedom and well-being.'"⁴⁸ The trouble is immediately obvious: it was previously established by Gewirth and accepted by the agent in (4) that freedom and well-being were necessary goods for agency in general. To be an agent at all, one must have the goods of freedom and well-being; therefore, one cannot accept that there may be a time when one may not have those goods. It is necessary, then, that others refrain from interfering with one's freedom and well-being.⁴⁹ As Gewirth explains:

Since every agent must accept (4), he must reject (9). And since (9) follows from the denial of (5), 'I have rights to freedom and well-being,' every agent must also reject that denial. Hence, every agent logically must accept (5) 'I have rights to freedom and well-being.'⁵⁰

In this manner, then, Gewirth puts forward the first major component of his theory of human rights, namely the idea that all agents have rights.

The hard-won rights to freedom and well-being, however, are only what Gewirth calls generic rights, "in that they are rights to have the generic features of successful action characterize one's behavior."⁵¹ In addition, he notes that these rights are prudential rather than moral:

in that the criterion consists for each agent in his own needs of agency in pursuit of his own purposes. Even though the right-claim is addressed to all other persons as a correlative 'ought'-judgment, still its justifying criterion for each agent consists in the necessary conditions of his own action.⁵²

At this point, then, our rights have been established, but they belong to no one but ourselves. In order to establish the rights to freedom and well-being as moral rights, Gewirth undertakes a number of additional steps and these form the second of the two main components of Gewirth's argument, namely that our rights are universal. As with the above argument for generic rights, I will simply outline Gewirth's argument for their universalizability in what immediately follows and will offer a critique in the next section of the chapter.

In order to make our rights to freedom and well-being universal, Gewirth begins with a further demonstration of the importance of agency to any right-claim in order to highlight the reason behind the rights, as Perry would argue he must. For Perry, "The fundamental challenge to each and every human rights claim is a demand for reasons."⁵³ And Gewirth is in agreement on this point, noting that:

Every right-claim or attribution of a right is made on behalf of some person or group under a certain description or for a certain reason that is held to justify the claim. . . . Without a reason, he would be making not a right-claim but only a peremptory demand akin to that voiced by a gunman.⁵⁴

With the need for such a reason in mind, Gewirth puts forward his argument for the universalizability of his generic rights. The structure of this point is relatively simple and Gewirth provides a clear explication:

Now whatever the description under which or the sufficient reason for which it is claimed that a person has some right, the claimant must admit, on pain of contradiction, that this right also belongs to any other person to whom that description or sufficient reason applies. This necessity is an exemplification of the formal principle of universalizability in its moral application, which says that whatever is right for one person must be right for any similar person in similar circumstances.⁵⁵

In the structure of Gewirth's argument, this principle of universalizability occupies steps (10) through (13).

The first step, (10), serves as a reminder of the nine steps that brought us to this point and established our generic rights. With all of those steps completed, Gewirth argues, the agent "must accept (10) 'I have rights to freedom and well-being because I am a prospective purposive agent,'

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where this ‘because’ signifies a sufficient as well as a necessary justifying condition.”⁵⁶ It is immediately obvious that our terms have changed a bit, as Gewirth has made the purposive agent into one who is also prospective. He has done so, he argues, because:

the agent claims these rights not only in his present action with its particular purpose but in all his actions. To restrict to his present purpose his reason for claiming the rights of freedom and well-being would be to overlook the fact that he regards these as goods in respect of all his actions and purposes, not only his present one. To be a prospective agent, then, is not necessarily to be an actual agent; it is rather to have desires or goals one wants or would want to fulfill through action.⁵⁷

In this way, the experience of agency has been expanded a great deal, for it is not necessary to actually engage in action or even to have excellent prospects for doing so in order to have rights to freedom and well-being. All that is necessary is “his occurrently or dispositionally looking ahead in some way to acting for purposes he regards as good.”⁵⁸

Having thus established the importance of adding this notion of prospecting, Gewirth then turns to demonstrating that being a prospective purposive agent (PPA) is both a necessary and sufficient reason for having rights to freedom and well-being, which he accomplishes through what he calls “the Argument from the Sufficiency of Agency (ASA).”⁵⁹ The argument runs as follows:

Suppose some agent were to reject (10), and were to insist, instead, that the only reason he has the generic rights is that he has some more restrictive characteristic R. Examples of R would include: being an American, being a professor, being an *Übermensch*, being male, being a capitalist or a proletarian, being white, being named “Wordsworth Donisthorpe,” and so forth. Thus, the agent would be saying:

(11) “I have rights to freedom and well-being *only* because I am R,”

where “R” is something more restrictive than being a prospective purposive agent.

Such an agent, however, would contradict himself. For he would then be in the position of saying that if he did *not* have R, he would *not* have the generic rights, so that he would have to accept

(12) “I do not have the rights to freedom and well-being.”

But, we saw before that, as an agent, he *must* hold that he has rights to freedom and well-being. Hence, he must drop his view that R alone

is the sufficient justifying condition of his having the generic rights, so that he must accept that simply being a prospective purposive agent is a sufficient as well as a necessary justifying condition of his having rights to freedom and well-being.⁶⁰

If the agent accepts that he has rights to freedom and well-being for no other reason than because he is a prospective purposive agent – and, as we have just seen, he must – it follows that “the agent must also accept (13) ‘All prospective purposive agents have rights to freedom and well-being.’”⁶¹ With the acceptance of (13), Gewirth has made our generic rights universal, as it “is a direct application of the principle of universalizability; and if the agent denies the generalization, then, as we have seen, he contradicts himself.”⁶²

It is also at this point that the generic rights change from merely prudential to moral ones. As Gewirth argues:

When the original agent now says that *all* prospective purposive agents have rights to freedom and well-being, he is logically committed to respecting and hence taking favorable account of the interests of all other persons with regard to their also having the necessary goods or conditions of action.⁶³

With that in mind, and “Since all other persons are actual or potential recipients of his action, every agent is logically committed to accepting (14) ‘I ought to act in accord with the generic rights of my recipients as well as of myself.’”⁶⁴ Expressed somewhat differently, this statement can be rendered as (15), what Gewirth calls the Principle of Generic Consistency: “Act in accord with the generic rights of your recipients as well as of yourself.”⁶⁵ In articulating the PGC, Gewirth, it seems, has succeeded in setting forth a non-religious foundation for the idea of human rights: human agency. Carefully taking us through these fifteen steps, he has demonstrated how the PGC is both rationally derived and how its acceptance is rationally required by every agent. The final section of this chapter will explore my critique of the PGC and argue that Gewirth’s foundation, while compelling, is ultimately inadequate when it comes to the task of grounding the idea of human rights.

A critique of Generic Consistency

In the twenty-five years since *Reason and Morality* was first published, the Principle of Generic Consistency has undergone nearly as much and as careful scrutiny as has John Rawls’ *A Theory of Justice*. Gewirth has done us a great service in responding to many of his critics himself and he has also received considerable assistance from Deryck Beyleveld, whose own work examines and refutes sixty-six well-crafted objections to the PGC. It

should be noted that it is not my intention, here, to rehearse all of these critiques, primarily because Beyleveld has done a fine job of collecting ten years of this scholarship but also because such a rehearsal does not serve the interests of this chapter.⁶⁶ I will, instead, focus on making three inter-related arguments that highlight what I consider the inadequacy of the PGC as a foundation for the idea of human rights. These arguments are by no means original and each has been examined in some detail by Gewirth and Beyleveld; however, I will argue that these important objections are not persuasively refuted, unlike the majority of the objections they consider. First, I will critique the notion that self-contradiction represents the most compelling argument against violating human rights; Gewirth's theory assumes both that all agents have the meta-desire to avoid contradiction and that contradiction is painful enough to prevent agents from violating human rights. Second, I will dispute Gewirth's argument about universalizability and contradiction by suggesting that an agent might accept the first part of Gewirth's theory about his own generic rights and reject without contradiction the second part about universalizing those rights. My final objection combines the first two, applying Michael Sandel's critique of Rawls' original position and veil of ignorance to Gewirth's PGC to argue that Gewirth's prospective purposive agents are too far removed from the real world in which human rights are actually in play.

To begin, then, let us consider the argument that engaging in a self-contradictory action would be impossibly problematic for any agent. It is important to note that the problem of contradiction seems to be simply implied, for nowhere does Gewirth actually make a case for why we may not engage quite comfortably in self-contradiction. In fact, in a footnote dealing with Millard Schumaker's multiple objections to the PGC, Beyleveld points out that quite the opposite is the case:

The error lies in Schumaker's reading of "incurring the pain of self-contradiction." We are to understand that Gewirth argues that PPAs will be motivated to be moral by the fact that to act immorally is to suffer some form of emotional distress. But to say that X does Y on "pain of self-contradiction" is to say only that if X does Y then X contradicts itself. It is not to say that if X does Y then X contradicts itself *and that* this state of affairs causes X to suffer anguish.⁶⁷

It seems, then, that self-contradiction is not necessarily painful for the agent. If it is not, we might wonder, what reason is there for avoiding it, particularly if engaging in it could be in an agent's self-interest or if avoiding it turns out to be costly? The only answer that Gewirth seems to provide comes at the very beginning of his argument for the PGC, in the following statement about his rational agent: "It is to be noted that the criterion of 'rational' here is a minimal deductive one, involving consistency

or the avoidance of self-contradiction in ascertaining or accepting what is logically involved in one's acting for purposes and in the associated concepts."⁶⁸ The assumption, here, is that all agents have a meta-desire for consistency upon which all of their rational decisions are built. And yet, it seems important to question whether we can assume that human beings are necessarily rational actors who behave as Gewirth outlines or, instead, a bundle of desires engaged in continual struggle, especially after looking at the psychoanalytic theory of Jacques Lacan.

Lacan's response to the sort of theory put forward by Gewirth would be, Malcolm Bowie notes, something to this effect: "How wrong we have all been until now, and how deluded; what a lesson we all need on the vanity of our wholeness-talk, our selfhood-talk and our integrity-talk."⁶⁹ Like Nietzsche before him, Lacan insists that desire is insatiable and will always go unfulfilled. Further, he argues that:

the essential day-to-day facts about human beings are these: they address each other and affect each other by what they say; they say what they mean and what they don't mean simultaneously; whatever they get they always want more, or something different; and at any one moment they are consciously aware of only some of what they want.⁷⁰

Lacan's vision of humanity, we can safely say, is both more complex and enigmatic than the one envisioned by Gewirth. The PGC, as we have seen, seeks to provide both a prudential and a moral explanation for respecting human rights. Lacan would most likely respond that Gewirth's agent is neither completely aware of his preferences nor certain of the language he uses to express his rights to freedom and well-being. For Gewirth, an agent's choices are predicated on an evaluation and ordering of desires, the most important of which is the meta-desire for rational action. For Lacan, this concept of ordering is itself mistaken because human beings are fundamentally broken rather than the unified agents that Gewirth assumes; perhaps the best we can do, he suggests, is to come to an understanding of death and live with it.⁷¹ Ultimately, he is far less willing than Gewirth to take anything as given – save the fundamental disunity of the world on which he bases his theory.

While this Lacanian critique is an interesting one, it is not the strongest argument against Gewirth on the question of contradiction. It might be the case that people are unable to rationally order their preferences, as Lacan argues, or that some people do not have the sort of meta-desire for rational consistency that Gewirth assumes for the purposes of his theory, but it certainly seems to be more often the case that people can and do. What Gewirth fails to properly consider, however, is the ability that people have to rationalize their actions in an effort to avoid the cognitive dissonance that comes with self-contradiction. He clearly recognizes the problem, pointing out that "some person may without inconsistency claim the right

to inflict various harms on other persons on the ground that he possesses qualities that are had only by himself or by some group he favors.”⁷² By way of a response, as noted above, he puts forward the ASA – that being a PPA is both the necessary and sufficient justificatory reason for having the generic rights. This answer seems not to have placated Gewirth’s detractors, nor has it gone far enough to suit me. Of course, Beyleveld deals with multiple versions of this objection in the fortieth through forty-fifth objections to the PGC. One such objection is that of Donald E. Geels, who “alleges that ‘[i]t is trivial to claim that whatever is right for one person must be right for any relevantly similar person in any relevantly similar circumstances,’ because there is no determinate criterion of relevant similarity.”⁷³ This sounds remarkably similar to Gewirth’s own objection to the formal principle, described above. As Beyleveld points out, however, Gewirth has quite clearly specified the criterion of relevant similarities:

a PPA must claim that it has the generic rights (according to the argument for the sufficiency of agency [ASA]) for the sufficient reason that it is a PPA. Because a PPA logically must claim the generic rights, it is the property of being a PPA that is logically required to be the criterion of relevant similarities.⁷⁴

More interesting, in my estimation, are arguments like the one made by N. Fotion, that “a ‘fanatic’ (read ‘elitist’) can grant itself rights on the grounds that it is a superior PPA, yet refuse to grant these rights to other PPAs, who are not superior PPAs, without contradiction.”⁷⁵ While Fotion has taken an important first step, namely recognizing that some PPAs will view themselves as somehow different or better than other PPAs, he has not truly challenged Gewirth’s PGC. Summarizing Gewirth’s own response to Fotion’s argument, Beyleveld says:

In effect, what Fotion fails to see is that agency, independent of the *content* of a PPA’s particular occurrent purposes or its SPR [“Subjective viewpoint on practical reasonableness”] for its purposes (represented here by the fanatic’s principle), has a normative structure. Since this normative structure reflects judgments that a PPA must accept on pain of contradicting that it is a PPA independently of the *content* of its purposes (because these judgments are functions of the necessary conditions of its pursuit/achievement of any purposes), a PPA *might* reason from its SPR, but can only do so consistently with the assumption that it is a PPA *if* these reasonings are consistent with the judgments contained in the necessary normative structure of agency.⁷⁶

Gewirth is correct in this refutation of the idea of a fanatic’s special status as a PPA, as is Beyleveld. But Fotion’s argument presents only part of the problem and, I believe, not its most difficult elucidation.

More challenging for Gewirth is the claim not that a PPA is in some way special and thereby deserving of rights, but instead that some other PPA is somehow damaged and thereby not worthy of them. Such an argument, however, seems neither to have been made directly against Gewirth nor is it carefully considered by him or by Beyleveld. Gewirth seems to recognize the existence of this problem – indeed, he seems to put it forward himself – but fails to really grapple with it in any meaningful way. He says:

To be P, that is, a prospective purposive agent, requires having the practical abilities of the generic features of action: the abilities to control one's behavior by one's unforced choice, to have knowledge of relevant circumstances, and to reflect on one's purposes. These abilities are gradually developed in children, who will eventually have them in full; the abilities are had in varying impaired ways by mentally deficient persons; and they are largely lacking among animals. . . . Since the quality that determines whether one has the generic rights is that of being P, it follows from these variations in degree, according to the Principle of Proportionality, that although children, mentally deficient persons, and animals do not have the generic rights in the full-fledged way normal human adults have them, members of these groups approach having the generic rights in varying degrees, depending on the degree to which they have the requisite abilities.⁷⁷

Of course, in reading these remarks, one must wonder whether it is acceptable to infringe upon the rights of those who fall within the categories Gewirth lays out. If one is like a child, then perhaps it is acceptable for society to take away one's rights to freedom and well-being. Surely that must be the case if one is like an animal for, as Gewirth says, "the lesser the abilities, the less one is able to fulfill one's purposes without endangering oneself and other persons."⁷⁸ There is something rather troubling about making these sorts of statements, but Gewirth seems not to see it. For him, it is sufficient to argue that one ought to have the generic rights to the degree to which one approaches being a PPA. Beyleveld's response to this objection, unlike his many others, is surprisingly lacking and is confined to a footnote. By doing so, he seems to have made things worse for Gewirth, as he points out that five theorists have taken issue with the PGC on this important point but then offers no substantive rejoinder. He says:

It seems to me that Gewirth's theory is essentially a theory of the rights of PPAs, and not a theory of human rights as such. . . . From this it follows that there are some human beings (those who are not even marginal agents) who do not have the generic rights, and that nonhuman beings might have the generic rights. . . . The question of the rights of "marginal agents" is, however, a more complex one. I do not

discuss this, because I view its importance as being for the argument *from* the PGC, rather than the argument *to* the PGC, with which this book is solely concerned; so I shall not discuss any of the above claims in detail.⁷⁹

Having sidestepped the issue entirely, he makes a few general points that deal with other issues raised by the objection and then offers some final words that are meant to provide consolation to the concerned:

A question might be raised about the extent to which the practical import of the PGC is narrowed by conative normality's being a definitional requirement of being a PPA. The answer is, Not very much! Conative normality is, after all, something that is characteristic of most adult human beings. In practice, we are required to treat human beings as conatively normal (as PPAs) unless we have compelling evidence that they are not PPAs.⁸⁰

The trouble with this response is pointed out by Richard Rorty, who offers the rejoinder, made by an agent who wants to infringe upon the rights of another, that philosophers like Gewirth "seem oblivious to blatantly obvious moral distinctions, distinctions any decent person would draw."⁸¹ For Rorty, the problem cannot be solved by sitting down with a chalkboard and diagramming how the agent and his potential victim are both PPAs. It is, he argues, a problem that will not be solved by demonstrating that the agent violates his victim on pain of self-contradiction because, for this agent, the victim is not properly a PPA, despite looking very much like one. The old adage about looking, swimming, and quacking like a duck comes to mind here; no amount of quacking will convince the agent that his victim is, in fact, a duck. As Rorty points out:

This rejoinder is not just a rhetorical device, nor is it in any way irrational. It is heartfelt. The *identity* of these people, the people whom we should like to convince to join our Eurocentric human rights culture, is bound up with their sense of who they are *not*. . . . What is crucial for their sense of who they are is that they are *not* an infidel, *not* a queer, *not* a woman, *not* an untouchable. . . . Since the days when the term "human being" was synonymous with "member of our tribe," we have always thought of human beings in terms of *paradigm* members of the species. We have contrasted *us*, the *real* humans, with rudimentary or perverted or deformed examples of humanity.⁸²

There are, I believe, two problems for Gewirth's theory here. The first is that an agent can quite clearly sidestep rational inconsistency by believing that his victim is somehow less of an agent (and, in the case presented by Rorty, less of a human being) than he is himself. The agent, here, might

recognize that his victim is a PPA, but other factors (being an infidel, a queer, a woman, or an untouchable) have far greater resonance and preclude her having the same rights as the agent. He might also recognize his victim as a potential PPA, but not one in the fullest sense of that term or one who has actually achieved that status; as Gewirth himself notes, “there are degrees of approach to being prospective purposive agents.”⁸³ It seems to me that the Nazis knew quite well that their Jewish victims could be PPAs in some sense; the Nuremberg Laws of 1935 confirm their awareness that Jews could plan and execute the same sorts of actions they could (voting and working, for example). The rights of the Jews could be restricted, however, because Jews were quite different from Germans; rather than PPAs in the fullest sense, they were, in the eyes of the Nazis, what Rorty calls “pseudo-humans.”⁸⁴ On this point, Rorty’s point is both clear and compelling:

Resentful young Nazi toughs were quite aware that many Jews were clever and learned, but this only added to the pleasure they took in beating such Jews. Nor does it do much good to get such people to read Kant and agree that one should not treat rational agents simply as means. For everything turns on who counts as a fellow human being, as a rational agent in the only relevant sense – the sense in which rational agency is synonymous with membership in *our* moral community.⁸⁵

The second problem for the PGC pointed out by Rorty is that it is overly academic and insufficiently pragmatic. In other words, its fifteen steps might be logically compelling to those in a philosophy department, but not to those who are actually making these decisions on inclusion and exclusion. “This is not,” Rorty tells us, “because they are insufficiently rational. It is, typically, because they live in a world in which it would be just too risky – indeed, would often be insanely dangerous – to let one’s sense of moral community stretch beyond one’s family, clan, or tribe.”⁸⁶ This second point leads to the final critique of Gewirth’s argument for the PGC.

In reviewing Gewirth’s argument to this point I have clearly been assisted by the very structure that he employs, for he is the consummate analytic philosopher. Each step he takes is clearly articulated and then defended against several possible criticisms. Further, there is, as we have seen throughout this chapter, something exceedingly logical in the organization he employs and, more than that, in his theory itself. In what might be a bit of a surprising turn, then, I will argue that this logic ultimately serves as Gewirth’s undoing. The problem, interestingly, is very similar to that which Gewirth himself notes of John Rawls’ *A Theory of Justice* and it is one he seems to anticipate. Indeed, he goes so far as to quote Friedrich Engels’ critique of theories that take too abstract a view of humanity. As Engels argues in the *Anti-Dühring*:

In order to establish the fundamental axiom that two people and their wills are absolutely equal to each other and that neither lords it over the other, we cannot use any couple of people at random. They must be two persons who are so thoroughly detached from all reality, from all national, economic, political, and religious relations which are found in the world, from all sex and personal differences, that nothing is left of either person beyond the mere idea: person – and then of course they are “entirely equal.” They are therefore two complete phantoms conjured up.⁸⁷

Gewirth recognizes that he must work through this objection and proposes that the way to do so is to offer an abstraction from our differences that does not completely ignore them and that is also “able to subject the differences or their alleged moral implications to moral evaluation.”⁸⁸ He has done so, he believes, by offering “the standpoint of the agent,”⁸⁹ or what Beyleveld calls “the internal viewpoint of PPAs *as* PPAs.”⁹⁰ Just because the ideas of agency and rights have been discussed in the abstract, Beyleveld argues, “does not mean that they are not of ‘real’ concern to real people.”⁹¹ This seems not to be a particularly compelling argument, in my estimation, nor does Beyleveld’s second attempt.

In responding to Virginia Held’s objection to the PGC – “If we require that in acting we are all so similar that we all claim the same thing, then Gewirth’s theory is a theory of the ideal agent rather than of real agents”⁹² – Beyleveld attempts to show that Gewirth is speaking of real rather than ideal agents. According to Beyleveld:

The only sense in which the generic features of agency are “abstract” is that they are universally and necessarily applicable to all PPAs *amid* their enormously varying particular occurrent purposes. In attending to the generic features, it is not assumed that PPAs are so similar that it will be in their particular occurrent interests for them all to make (wish to make) the same rights-claims. It is assumed only that PPAs, whatever their particular occurrent purposes, are PPAs (that they have purposes). It follows *logically* from *the fact that PPAs have purposes* that they must accept the PGC. It, therefore, follows logically, *for PPAs with varying particular occurrent purposes and characteristics*, that they must accept the PGC. For, whatever their particular occurrent characteristics, to deny the PGC is to deny that they have purposes, and this is to deny that they have *any* particular occurrent purposes (which, of course, includes the ones they have).⁹³

Despite his best efforts to demonstrate the way in which the PGC applies to real agents, Beyleveld has simply restated Gewirth’s argument and, in my estimation, added additional jargon that seems to encourage rather than refute Held’s objection. The biggest difficulty with this defense –

apart from the way it is worded, which lends credence to our belief that there is something not quite human about these PPAs – is that Beyleveld seems to have conflated characteristics and purposes. It is correct that a PPA must accept the PGC regardless of the nature of his purposes, for having any purposes at all entails that he is a PPA and being a PPA necessitates his acceptance of the PGC. However, it does not follow that he must accept the PGC regardless of the nature of his (or others') characteristics, for these characteristics might invalidate some aspect of the PGC. He might be, for example, one of the unfortunate marginal agents discussed above; alternately, he might be acting upon one of those marginal agents, in which case he need not worry about granting the generic rights that he claims for himself. Beyleveld's response to this concern seems lackluster:

a PPA, regardless of its particular occurrent characteristics, is logically required to concentrate attention on the generic features as the basis of its rights-claims, and must restrict its *categorically binding* rights-claims to these features, because it is not logically required to attend to any other features.⁹⁴

Leaving aside the fact that Beyleveld refers to PPAs as neither "him" nor "her," but rather "it," at the same time that he is attempting to humanize them, the argument he makes here does not stand up to scrutiny.⁹⁵ All he claims is that PPAs are required to base their rights-claims on the generic features of action (which everyone, except for marginal agents, must possess) because they are not required to base those claims on other features. This does not mean that a PPA cannot base his claim on characteristics other than the generic features of action; it simply means he must also include the generic features of action in his claim, as they – unlike the other characteristics – are necessarily connected with agency.

By and large, then, it seems that Gewirth has not gone a great distance toward refuting this critique, nor has Beyleveld offered much assistance. In fact, Gewirth seems to recognize his shortcoming even as he attempts to offer his response to Engels:

Hence, while not entirely exempt from Engels's criticism, the present approach in terms of the generic features of action has an important justification. For it sets up a morally neutral starting point that does not accept persons' actual power relations and other differences as a moral datum.⁹⁶

This, though, seems to be the point of Engels' critique and of more recent critiques of analytical theories that attempt to abstract away from the world in order to discuss it. Indeed, Michael Sandel's objections to Rawls' well-known ideas of the original position and veil of ignorance are equally

apt in looking at the greatest weakness of Gewirth's theory. Although Sandel stands quite close to Rawls on the question of what a liberal society's principles of justice ought to be, he contends that Rawls' assumptions about the populace of that society provide a poor foundation for his principles. The presuppositions that Sandel accuses Rawls of making are four-fold. First, the Rawlsian self is seen as one that possesses its assets. In other words, the self and its assets are separable from one another. One must wonder, though, what actually constitutes each individual human being if not all the things that make up those particular selves. Next, Rawls suggests that the self is prior to and independent of its ends; put another way, the self is seen as the selector of its ends. If each self chooses its own ends, there can be no ultimate conception of the good, and Rawlsian societies must not choose a particular conception of the good in order to avoid impinging on the many and various choices of the selves in these societies. Third, selves are perfectly indifferent to one another in the original position; they are radically and fully separate from one another. Finally, the Rawlsian self has nothing to reflect upon about itself. It cannot ask, "Who am I?" because it has no identity beyond being an abstract possessor and selector. The problem, for Sandel, is that human beings are not constituted in this way: "To imagine a person incapable of constitutive attachments . . . is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."⁹⁷ If these selves actually existed, Sandel asserts that they likely would not adopt the Rawlsian principles of justice. They are, after all, not bound by common identity, by sympathy, or by mutual agreement on a common good, so they would be more likely to choose the market-driven society that someone like Robert Nozick describes. As Sandel argues:

We cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular person we are – as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic. Allegiances such as these are more than values I happen to have or aims I "espouse at any given time". They go beyond the obligations I voluntarily incur and the "natural duties" I owe to human beings as such. They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am.⁹⁸

Sandel claims, then, that we must invoke a much richer notion of selfhood and a deep sense of community if we hope to achieve Rawls' conclusions. There exists, of course, a great deal of debate about the value of Sandel's

critique, especially on the question of whether Rawls intended his original position to be an accurate description of the world around us. As mentioned in note twenty-one, it seems clear that Rawls is conducting a thought experiment and that the parties in the original position are not meant to constitute human beings who exist in society. Sandel, however, does not seem to take this into account at all in his critique of Rawls and, for that, his argument loses a great deal of its force. The same seems not to be true, I believe, of Gewirth's PGC for, while Gewirth is also engaged in a thought experiment, his has to do with establishing the generic rights and the relevant features of action, not with the construction of the PPAs themselves. Indeed, as noted above, both Gewirth and Beyleveld go to great lengths to establish that their PPAs are, in fact, real rather than ideal agents and that the problems that people face in the world are the problems faced by PPAs. In this way, I believe Sandel's critique to be more applicable to the PGC than it is to Rawls' conclusions.

Conclusion

In order to offer a truly compelling non-religious foundation for the idea of human rights, one must do more than Gewirth has done in demonstrating the logical necessity of accepting a principle that entails the universalization of the generic rights of freedom and well-being. As we have seen, Gewirth crafts an interesting argument for human rights in theory, but runs into considerable trouble when his theory is put into practice. As critics like Rorty and Sandel point out, there is something about the Principle of Generic Consistency that rings a bit hollow. For Rorty, the problem lies in Gewirth's failure to appreciate the fierce partiality that often drives human rights violations; it is a confusion to point out contradictions to those who either refuse to recognize them or are not terribly troubled by them. For Sandel, the PGC must fail for the same reason that Rawls' original position fails; there is simply no getting around the fact that human beings are more complex than abstract possessors of goods or prospective purposive agents. Any examination of human life that abstracts in these ways removes the discussion too far from the real world in which human rights are actually violated. These violations cannot be said to be the same thing as the simple removal of freedom and well-being from a PPA, for this sort of language is hopelessly sterile. Human rights violations happen, instead, to men like Aleksandr Solzhenitsyn and Primo Levi, who struggle desperately to survive and, if successful, carry the scars of their experiences with them for the rest of their lives. This is a mistake of the highest order, one that Gewirth and Beyleveld cannot possibly intend to make, but that creeps up on them as the abstractions with which they deal multiply.

In abstracting away so many characteristics from human beings in order to create the prospective purposive agent, something has clearly been lost from Gewirth's account of the justification for human inviolability. It

might be philosophically interesting to consider whether the generic features of action can logically provide a non-religious grounding for the idea of human rights, and it might provide a response to Perry, but what is at stake seems overly academic. Human rights, conversely, are not simply academic – as both Perry and Gewirth recognize, with their talk about the importance of persuasiveness – and their justification is far more than a philosophical puzzle; they are terribly serious, often a matter of life and death. For this reason, human rights cannot be considered in a vacuum and any attempt at their justification must be firmly entrenched in the real world. While I have quibbled with the PGC on its own terms and argued that (15) does not necessarily follow from (1), and while I have noted that a great many other theorists have done likewise, my deepest critique is that the PGC's assumptions cause a great deal of trouble whether or not Gewirth's theory ultimately makes logical sense. As Rorty argues, Gewirth's theory removes the discussion of human rights from the realm of the actual and concentrates on the purely theoretical. In doing so, it calls to mind Arthur Koestler's point that "Statistics don't bleed; it is the detail which counts."⁹⁹ Neither, it seems to me, do PPAs bleed. And the terrible reality is that human beings do, often at the hands of others. This grim reality is not surprising to anyone, but it is not often expressed in the way that Samantha Power does, for example. In writing about the 1994 genocide in Rwanda, Power offers a quotation from a UN official on the ground during the worst of the violence:

When we arrived, I looked at the school across the street, and there were children, I don't know how many, forty, sixty, eighty children stacked up outside who had all been chopped up with machetes. Some of their mothers had heard them screaming and had come running, and the militia had killed them, too. We got out of the vehicle and entered the church. There we found 150 people, dead mostly, though some were still groaning, who had been attacked the night before. . . . The Rwandan army had cleared out the area, the gendarmerie had rounded up all the Tutsi, and the militia had hacked them to death.¹⁰⁰

This sort of thick description stands in marked contrast to the kind of language that Gewirth employs in his discussion of the PGC's applications. Consider the following example, one of the few in which Gewirth departs from talking about PPAs and assigns names:

Suppose Ames physically assaults Blake, who defends himself by physically assaulting Ames. In a purely formal view, Ames and Blake are each disobeying the moral principle that requires persons to respect and not infringe one another's well-being. On the PGC's substantive view, however, these two infractions are not on a par as being both unjustified. Since Ames inflicted or acted to inflict basic harm on

Blake, and hence intended to violate a generic right of Blake while acting in accord with his own generic rights, Ames's intention was inconsistent and his action morally wrong.¹⁰¹

Because they are not real and no attempt has been made to make them real for us, we do not – we cannot – become emotionally attached to Ames and Blake, and we do not care, therefore, what happens to either of them. Our eyes trip lightly over the words “physically assaults” in Gewirth's example in a way that they cannot move past the words “who had all been chopped up with machetes” in Power's.

We have no conception, of course, of what it would be like to die at the hands of a man wielding a machete or to wield that machete ourselves. By and large, we cannot even conceive of watching such a terrible spectacle. But we react to the idea of this crime in a far more immediate way than we do to the abstract physical assaults of Ames and Blake. The difference is two-fold for William F. Schulz, the former Executive Director of Amnesty International USA. First:

I am stricken at heart because I have the imagination to know at least in proximate form what the experience, the pain, must have felt like. I am stricken at heart because on some level I identify with the victims; I know what it is to bleed.¹⁰²

Second:

when I heard of cases of cruelty, I responded with revulsion. . . . It is a revulsion grounded in part in recognition. Recognition not that I am capable of inflicting exactly that kind of pain, I trust, but recognition that the capacity to inflict suffering, like the capacity to feel compassion, is a familiar one.¹⁰³

Because we can imagine, at least in some small way, what it must have been like to be a victim in that situation, we recognize the importance of defending the idea of human rights around the world. And because we are all too familiar with the deepest and darkest part of ourselves, we can contribute to the conversation about how best to prevent violations of human rights. I have argued throughout this chapter, for a variety of reasons, that men who butcher women and children like animals will not be dissuaded by Gewirth's argument that they are acting inconsistently. The claim that we are all rational agents simply cannot bear the weight of the idea of human rights. If we want to argue, as Gewirth does, that there are certain features or qualities about human beings that preclude their wanton destruction, they must be far more persuasive than the generic features of action and they must be grounded in the world as it is rather than only in the world of theory.

3 The problem of secular sacredness

Ronald Dworkin, Michael Perry,
and human rights foundationalism

As the first two chapters have made abundantly clear, human beings seem to have the unique ability to devise cruel ways in which to harm one another. In one sense, this is the very reason why the project of justifying human rights is such an important and topical one. At the same time, however, it is not far-fetched to wonder if there actually exist any qualities that make us worthy of special protection or whether Thomas Hobbes was right when he said that our equality stemmed from the ability of one individual to kill any other.¹ If human history is, in fact, little more than a lengthy tale of misery and violence, then we ought to hope for a way to protect, for example, the right to life, but we ought not be overly naive in thinking that its foundation can be found within us. In his discussion of the myth of the noble savage, Steven Pinker quotes William James on this point:

We, the lineal representatives of the successful enactors of one scene of slaughter after another, must, whatever more pacific virtues we may also possess, still carry around with us, ready at any moment to burst into flame, the smoldering and sinister traits of character by means of which they lived through so many massacres, harming others, but themselves unharmed.²

This ominous view of humanity, espoused forcefully by Friedrich Nietzsche and considered in the first chapter, is rather unpopular today; I suspect that it is, to a great extent, why so many people are unwilling even to consider the conclusions about human nature offered by Pinker and other evolutionary biologists (and considered in greater detail in the next chapter). And yet, Pinker argues:

The prevalence of violence in the kinds of environments in which we evolved does not mean that our species has a death wish, an innate thirst for blood, or a territorial imperative. There are good evolutionary reasons for the members of an intelligent species to try to live in peace. . . . Thus while conflict is a human universal, so is conflict

resolution. Together with all their nasty and brutish motives, all people display a host of kinder, gentler ones: a sense of morality, justice, and community, an ability to anticipate consequences when choosing how to act, and a love of children, spouses, and friends.³

Even amongst those who believe – in Michael Perry’s words – “that the world is nothing but a great cosmic process utterly bereft of ultimate meaning and therefore, from a human point of view, absurd,”⁴ there is a sense of hopefulness about the possibility of finding some redeeming quality of humanity upon which the idea of human rights might be based.

To this point, we have examined Perry’s claim that this hopefulness can only be fulfilled by adopting a religious cosmology of one sort or another and I have argued that religion – or, at least, organized religion – does not necessarily provide a groundwork for the sort of robust understanding of egalitarian rights that the international community outlined in the Universal Declaration of Human Rights. Further, we have seen the impact of a theory like Nietzsche’s that is antithetical to the concept of rights itself. We also began the attempt to locate a non-religious justification for the idea of human rights, focusing in the preceding chapter on Alan Gewirth’s argument for the Principle of Generic Consistency (PGC) and my objection that such a principle is too far removed from our world, the one in which rights are really at issue. This chapter picks up, in a sense, where the previous one left off; in it, I examine another response to Perry’s argument, one that attempts to provide a more compelling defense of rights than Gewirth’s PGC could offer. In the first section, the discussion focuses on a non-religious conception of human rights, as outlined by Ronald Dworkin. The second section considers Perry’s objections to Dworkin’s theory of secular sacredness, while the final section presents my rebuttal to Perry’s question, quoted earlier, about the idea of human rights being a fundamentally religious one. I argue that human dignity actually provides the foundation, and that – contrary to existing theoretical work on this subject – sacredness and dignity should not be treated as synonyms.

Toward a secular conception of “sacred”

In writing about the debates surrounding abortion and euthanasia, Ronald Dworkin asserts that “there is a secular as well as a religious interpretation of the idea that human life is sacred.”⁵ The religious version of human sacredness, Dworkin notes, is easy enough to understand, as it is based on the notion that all living things are “imaginative designs produced by God’s inspired genius, to be honored as such.”⁶ His secular vision, however, is considerably more complicated and will be evaluated in greater detail below. Dworkin’s core claim is that “most people who are not religious also have general, instinctive convictions about whether, why, and how any human life has intrinsic value.”⁷ Irrespective of the chain of

reasoning behind it, Dworkin argues, most people acknowledge the intrinsic value of human life.⁸ At bottom, we feel that “it is *intrinsically* regrettable when human life, once begun, ends prematurely. We believe, in other words, that a premature death is bad in itself, even when it is not bad for any particular person.”⁹ While he admits that there is a powerful critique of the idea of intrinsic value – simply put, that “objects or events can be valuable *only* when and because they serve someone’s or something’s interests”¹⁰ – he believes that he can provide a persuasive answer. “Something is intrinsically valuable,” Dworkin suggests, “if its value is *independent* of what people happen to enjoy or want or need or what is good for them.”¹¹ He notes that we often regard events and objects as being valuable in themselves and that, therefore, the idea is a familiar one to us; examples include “knowledge, experience, art, and nature.”¹² However, he takes care to distinguish between these sorts of things, which are valuable incrementally, and things – like human life itself – which he suggests are “*sacred or inviolable values.*”¹³ In other words, while we believe that the more knowledge or experience we have the better, we feel differently about simply creating as much human life as possible: “It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted.”¹⁴

Some people may intuitively understand Dworkin’s claim that certain things are valuable in themselves, regardless of whether this encourages us to increase our inventory of them or simply value those that are already in existence.¹⁵ Perry concludes, however, that “The notion that something is valuable independently of a beneficial relation to anyone or anything – whether a human being, a nonhuman but living entity, or God – is perfectly opaque.”¹⁶ It is, he notes, illogical to claim that something might be valuable in itself and, at the same time, have no value for anyone, as Dworkin seems to suggest. Instead, Perry argues that something is intrinsically valuable when it “has value for someone (or something) *not merely as a means to an end but as an end in itself.*”¹⁷ Strangely, the italicized portion of this quotation is less important to this discussion than the words that precede it, for the main difference between his and Dworkin’s definitions of intrinsic value is that Perry maintains that things can only be intrinsically valuable if they have value for someone or something. Dworkin, he suggests, might have wanted to say that human life is objectively valuable, which would be

to say that something has value for someone (for example, that it is good for her, that it is conducive to or perhaps even constitutive of her flourishing) *even if she is unaware that it has value for her – indeed, even if she believes that it has disvalue for her.*¹⁸

On my reading, Dworkin has indeed substituted intrinsic for objective value, setting the former in opposition to subjective value and omitting the

latter entirely, but he has done so without equating value with benefit in the way that Perry insists he must. To do so, Dworkin seems to suggest, would require yet another type of value: "Something is *instrumentally* important if its value depends on its usefulness."¹⁹ He notes,

David Hume and many other philosophers insisted that objects or events can be valuable only when and because they serve someone's or something's interests. On this view, nothing is valuable unless someone wants it or unless it helps someone get what he does want.²⁰

But, as Perry argues:

The second sentence here is a glaring non sequitur. It does not follow, from the Humean view, that nothing is valuable unless someone wants it or unless it helps someone get what he does want. It follows only that nothing is valuable unless it serves someone's or something's interests. That something serves my interests does not entail that I want it (or that it helps me get what I do want). After all, I may not know that something serves my interests, or I may not know what my real interests are. Indeed, that I want something (or that it helps me get what I do want) does not entail that it serves my interests: I may want things that are not good for me – indeed, that are bad for me.²¹

This trouble over the definition of intrinsic value is only the beginning of the disagreement between the two theorists. And the burden seems to fall on Dworkin, who says he will provide an answer to questions like, "How can it be important that a life continue unless that life is important for or to someone?"²²

To answer this question, we must turn to Dworkin's suggestion that the current controversies over abortion and euthanasia can be traced to the fact that most people hold human life sacred. While we generally associate "sacred" with the religious idea of holiness, Dworkin argues that the sacredness of human beings can be held as a "secular but deep philosophical belief,"²³ rather than one that is necessarily religious in origin. Something might be held sacred when we attach a certain value to it, when we hold it in very high esteem. Perry's initial rebuttal of this notion of secular sacredness is that intrinsic value, using his definition of the term, is necessary but not sufficient to establish sacredness: "An end to my itch has both objective and intrinsic value for me, but it is not thereby sacred."²⁴ The reply that remains to Dworkin is that Perry's definition of intrinsic value is simply not as strenuous as his own. Under his own definition, intrinsic value is both a necessary and sufficient condition for sacredness, while Perry deliberately weakens his definition in order to leave room for the very problem he then demonstrates. The further challenge that Perry presents to Dworkin, however, is a more difficult and engaging one:

For some persons who count themselves religious, to say that every human being is sacred is to say (speaking analogically) that every human being is the beloved child of God (God who is love). For persons who do not count themselves religious, what does it mean to say that every human being is sacred?²⁵

Unlike its predecessor, this challenge goes a great distance in pressing Dworkin's conclusions and will provide a platform for this chapter's inquiry into the relation of human rights and human sacredness.

For Dworkin, "something is sacred or inviolable when its deliberate destruction would dishonor what ought to be honored."²⁶ While this definition is not particularly helpful, the expansion that he undertakes is instructive. There are, Dworkin asserts, two ways in which something might be considered sacred. The first, sacredness by association, is explained through the example of flags and other national symbols: "Many Americans consider the flag sacred because of its conventional association with the life of the nation; the respect they believe they owe their country is transferred to the flag."²⁷ The second, sacredness based on creation, can be demonstrated by looking at our attitude toward endangered species or cultures.²⁸ It is this second understanding of sacredness that Dworkin suggests is behind the feeling most people have about not wasting human life. This language of creation, he acknowledges, immediately brings to mind the notion that human beings are sacred because each is a child of God. He argues, however, that the same conservationist result can be obtained by secular means:

For most Americans, and for many people in other countries, the evolutionary process is quite literally creative, for they believe that God is the author of nature. On that assumption, causing a species to disappear, wholly to be lost, is destroying a creative design of the most exalted artist of all. But even people who do not take that view, but who accept instead the Darwinian thesis that the evolution of species is a matter of accidental mutation rather than divine design, nevertheless often use artistic metaphors of creation. They describe discrete animal species as not just accidents but as achievements of adaptation, as something that nature has not just produced but wrought.²⁹

There is an unmistakable connection drawn here between art and life. Indeed, the crux of Dworkin's argument is that "each developed human being is the product not just of natural [divine or evolutionary] creation, but also of the kind of deliberative human creative force that we honor in honoring art."³⁰ The first part of this claim is straightforward enough; human beings, he suggests, are considered sacred because they are the highest biological form of life. The second, however, requires some unpacking. What does it mean to say that each individual life results from

deliberately-applied human creativity? Here, Dworkin moves beyond the idea of sacredness as given to human beings by virtue of their biology (whether influenced directly by God or through natural processes) and focuses on sacredness as produced by human beings.

It is this move, from created to creating, that provides Dworkin with the most interesting component of his secular claim. He argues that both the decision to have a child and the child's life itself are creative endeavors. He notes that "a deliberate decision of parents to have and bear a child is of course a creative one. Any surviving child is shaped in character and capacity by the decisions of parents and by the cultural background of community."³¹ It is not immediately clear, though, why Dworkin believes that the sacredness of persons flows from the decision of parents to have a child or from their shaping of its character. In order to provide a more thorough explanation of his word choice, Dworkin returns to the idea of life as artwork: "As that child matures, in all but pathological cases, his own creative choices progressively determine his thoughts, personality, ambitions, emotions, connections, and achievements. He creates his life just as much as an artist creates a painting or a poem."³² This idea – that human beings shape their lives and, in a sense, create themselves – is the grounding of Dworkin's secular usage of sacredness. Of course, because his multi-part definition contains both religious and secular elements, Dworkin is confident that it is sufficiently inclusive to command the respect of the religious and non-religious alike. He is certainly correct in his assumption that those who believe that each human being is a child of God will agree with his claims about the sacredness of persons. Dworkin's non-religious claim may not perform its function as effectively, however. Indeed, the process as outlined is certainly a creative one, but we might be justified in wondering whether it makes human life sacred or simply beautiful, unique, or important.

Michael Perry's objection

The crux of Perry's complaint about Dworkin's secular sacredness proceeds from the assertion that a human life is a work of art made valuable as a result of natural and human investments. Summarizing the problem, he says

Let us agree that every human being is a creative masterpiece and, as such, inspires (or should inspire) awe in us. That something justifiably inspires awe in us, however – James Joyce's *Ulysses*, for example – entails neither that we believe it to be sacred nor that it is sacred.³³

For Perry, a sacred thing is one which – due to its sacredness – inspires awe in us and which, consequently, we value highly.³⁴ Dworkin, however, reverses the order, suggesting that something is held sacred in response to

its inherent value, to the awe it inspires in us. The problem with this reversal, according to Perry, is that it makes secular sacredness entirely subjective. Dworkin, he suggests, appeals to no objective standard in his argument for secular sacredness and thus leaves himself open to the possibility that others simply will not feel as he does about the value of mankind. He argues that:

Dworkin seems to be using “sacred” in what we can call a weak, or “subjective”, sense – something (e.g., a human life) is sacred *because*, or *in the sense that*, it inspires awe in us and we attach great value to it – rather than in the strong, or “objective”, sense – something is sacred and *therefore* it inspires awe in us and we attach great value to it.³⁵

To add specificity, Perry asks that we imagine using Dworkin’s secular concept of human sacredness to change someone’s mind about the human rights violation he is about to commit. He hopes that, in thinking through the discussion we might have with a Bosnian Serb intent on raping a Bosnian Muslim, we will come to the conclusion that an appeal to some objective standard carries more weight:

If “sacred” is meant in the subjective sense, the Bosnian Serb can reply: “Sacred to you and yours, perhaps, but not to me and mine. In the scheme of things, we happen not to attach much value to her life.” By contrast, “sacred” in the objective sense is not fundamentally a matter of “sacred to you” or “sacred to me”; it is, rather, a matter of how things really are If every human being is sacred in the objective sense, then, in violating the Bosnian Muslim, the Bosnian Serb does not merely violate what some of us attach great value to; he violates the very order of creation.³⁶

While Perry’s point is a compelling one, and one that Dworkin does not address, I am not entirely convinced that he has presented the knock-down argument to Dworkin’s secular claim. Instead, Perry has raised three interesting and interrelated problems for himself with this example.

First, we might ask whether Perry is actually responding to Dworkin on his own terms. Because Perry questioned the definition of intrinsic value that Dworkin put forward and then simply proceeded with his own instead, he now misses an important component of Dworkin’s argument. In failing to show conclusively that intrinsically valuable things must have value *for* someone or something, Perry leaves Dworkin free to argue that human life is valuable in itself and, in that respect, to provide an answer to the imagined Bosnian Serb. Nowhere, after all, does Dworkin suggest that skeptical people ought to be convinced that human life is sacred simply because it is valuable to him (or to us). Instead, Dworkin claims that human life is

intrinsically valuable – valuable in itself – and, in doing so, he manages to side-step Perry’s charge of subjectivity. Indeed, Dworkin’s entire argument that human lives be considered creative masterpieces is his attempt to show that it is, in fact, possible for something to be valuable without its having value for anyone in particular. We are entitled, of course, to question whether Dworkin actually succeeds in demonstrating the intrinsic value of human life. And, indeed, a compelling case can be made against Dworkin on this question of intrinsic value. He has not, in fact, shown anywhere that events or objects *should* be considered valuable in and of themselves.³⁷ He has, however, asserted that we believe some events or objects *are* valuable in this way. But is this sufficient to convince those who do not?

This question spills directly into the second problem, namely that, in adding the concrete example of ethnic cleansing in Bosnia, Perry has altered his project in an important way. Rather than seeking to demonstrate that the only intelligible version of human rights is one that has its roots in religion, Perry now entertains the hope of convincing others of the virtues of the contemporary international human rights regime. That these are two very different projects is demonstrated nicely by Christopher Eberle in his discussion of moral obligation stemming from the Divine Command Theory (DCT). He notes that:

Even if the Divine Command theorist can’t justify the DCT to anyone else, it’s *possible* that she’s justified in adhering to the DCT: given the particularities of her epistemic condition, and in particular, given the other theistic claims she affirms, it’s possible that her perspective on the world entitles her to believe that the DCT is true.³⁸

This is very much in line with an argument that Perry makes in a recent essay about the religious nature of the notion of human inviolability. He sketches out the belief system of a woman whose faith helps her to love even those who are the most unfamiliar or remote, as well as those who harm her: “Sarah loves even those from whom she is most estranged and towards whom she feels most antagonistic: those whose ideologies and projects and acts she judges to be not merely morally objectionable, but morally abominable.”³⁹ In agreement with Eberle, Perry notes that:

Sarah’s religious position is embedded in – and it has whatever plausibility or implausibility it has because of its embeddedness in – a broader family of religious claims, especially the claims that (a) every human being is a beloved child of God and a sister or brother to one’s self and (b) human beings are created by God to love one another.⁴⁰

The heart of the matter, then, is that Sarah and the Divine Command theorist are free to believe whatever it is that they would like to believe – just as I may justify my own beliefs in any way I might like – but they

ought not assume that anyone else will be convinced by the same reasoning that convinces them. In our attempts to justify our beliefs to others, we ultimately reach a point beyond which we can rationally argue no further. This is true whether our beliefs are based in religion, nature, or reason. Even Immanuel Kant, upon completing his *Grounding for the Metaphysics of Morals*, recognized this problem:

Now it is an essential principle of all use of our reason to push its knowledge to a consciousness of its necessity (for without necessity there would be no rational knowledge). But there is an equally essential restriction of the same reason that it cannot have insight into the necessity either of what is or what does happen or of what should happen, unless there is presupposed a condition under which it is or does happen or should happen. In this way, however, the satisfaction of reason is only further and further postponed by the continual inquiry after the condition. Reason, therefore, restlessly seeks the unconditionally necessary and sees itself compelled to assume this without having any means of making such necessity conceivable; reason is happy enough if only it can find a concept which is compatible with this assumption. . . . And so even though we do not indeed grasp the practical unconditioned necessity of the moral imperative, we do nevertheless grasp its inconceivability. This is all that can be fairly asked of a philosophy which strives in its principles to reach the very limit of human reason.⁴¹

Sarah, the Divine Command theorist, and Kant must all eventually say, with Wittgenstein, “If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’”⁴²

Perry, however, is critical of those – like Dworkin – who would attempt to convince others of the rightness of human sacredness either without first successfully specifying their source of normativity or whose source of normativity “doesn’t withstand scrutiny even on its own (secular) terms.”⁴³ On this point, that there is something incomplete about the non-religious argument, Perry notes that the assertion that all human beings are sacred and, as a result, inviolable, is simply a statement of the theorist’s own preference for a world in which these beliefs are honored. The problem, however, is that this preference for a world that respects human rights does not necessarily line up with non-religious beliefs about the way the world works. In agreement with Perry on this point is Jeffrie Murphy, who notes that:

Liberal theorists have a self-destructive tendency to be charmed by views that undermine their own central doctrines – for example, a failure to realize that the liberal virtues of value pluralism and value

tolerance may undermine the absolutism about human rights upon which liberalism ultimately depends.⁴⁴

According to Perry, the problem is not simply one of competing liberal virtues; instead, it goes as deep as these theorists' core beliefs:

It is a presupposition of the nonreligious position that the universe is just what Clarence Darrow and Steven Weinberg (among others) have proclaimed it to be: a cosmic process bereft of ultimate meaning. . . . Far from being created "in the image of God," human beings are merely the unplanned, unintended yield of random mutation and natural selection. But, lo and behold, it just happens that the evolved nature of human beings is such that being a person who "loves one another just as I have loved you" is the most deeply satisfying way of life of which human beings are capable. This free floating nonreligious position seems so ad hoc, as if those who espouse the position were determined to cleave to a consoling belief about human nature long after the religious vision in which the belief has traditionally been embedded has ceased to have, for them, credibility.⁴⁵

Perry charges, in other words, that nonreligious thinkers have embraced a cosmology that looks upon human existence as the product of random chance, but hope to maintain a foundation for the idea of human rights. The problem is that such a contingent picture of human nature does not provide a solid enough grounding for human rights; this view, he argues, cannot possibly prove effective in the face of counterclaims by human rights abusers. This is a valid critique, but the religious position – despite specifying a source of normativity – also offers no assistance when the task is persuading those with different beliefs. Sarah believes that:

By becoming [people who love one another as God loves us], we fulfill – we perfect – our created nature and thereby achieve our truest, deepest, and most enduring happiness. That fact, coupled with our commitment to our own authentic well being, is, according to Sarah, the source of normativity.⁴⁶

The problem, of course, is that Sarah's source of normativity is the result of her own deep, yet personal, religious commitment, a commitment that she cannot really justify to others in a convincing manner. As Perry notes, "Sarah specifies the source of normativity – though, of course, if one is a nonbeliever, or a believer of the 'wrong' sort, the source Sarah specifies will not move one."⁴⁷

This yields the third – and, in my opinion, most interesting – problem that Perry's critique raises. Indeed, it offers us an entrée into the central argument that underlies *The Idea of Human Rights*. In his critique of

Dworkin, Perry insists that “The premise that every human being is sacred-in-the-subjective-sense cannot begin to bear the weight of the premise that every human being is sacred-in-the-objective-sense.”⁴⁸ By stating his objection in this manner, he alludes to the problem discussed above: that Dworkin’s argument for secular sacredness is not convincing in the same way as the religious argument (or not convincing at all). Put succinctly, Perry contends that at the center of every human rights claim is the notion of the sacredness of persons, which is, *contra* Dworkin, a fundamentally religious concept. His project is to examine some of the existing non-religious understandings of “the conviction that every human being is sacred – *sacred in the strong/objective sense, sacred because of how the world really is, and not because of what we attach value to in the world.*”⁴⁹ But, in framing the search in this way, Perry sets an impossible task for others to accomplish. The closest that Dworkin comes to succeeding is in his discussion of intrinsic value, where he poses a question that is notable for its conditional wording: “If it is a horrible desecration to destroy a painting, for example, even though a painting is not a person, why should it not be a much greater desecration to destroy something whose intrinsic value may be vastly greater?”⁵⁰ Were he to remove the conditional wording and answer this question, which he does not, he would still fail in his project of suggesting a secular understanding of human sacredness. The best answer Dworkin can give is one he gave earlier: destroying a person would be a much greater desecration than destroying a painting based on the fact that we believe human lives to be intrinsically valuable or sacred, which is itself based on our belief that human beings are the most creative species in existence. But this is not the same as arguing that human beings actually *are* valuable in and of themselves, nor will it convince those with radically opposing beliefs to change their minds. How, after all, can we talk about something having intrinsic value in the absence of some external and unchanging measuring tool? As Perry asks, “How do we get from ‘the universe is (or might be) nothing but a cosmic process bereft of ultimate meaning’ to ‘every human being is nonetheless sacred (in the strong or objective sense)?’”⁵¹ How, in other words, might a human life be both sacred *and* low-level nuclear waste? In order to show that something is objective, non-religious, and sacred in the sense that Perry wants, one must actually show that it is *religiously* non-religious, which would – of course – defeat the purpose.

The idea that Perry is looking for something that is both religious and non-religious at once is a difficult one to grasp and requires some investigation. The most fruitful way to do so is to continue our detailed examination of Perry’s argument to see how he creates this puzzle. Both Perry and Dworkin attempt to draw political conclusions from the notion of the sacredness of persons. Just as Dworkin hopes to find a grounding for the debate about abortion and euthanasia, Perry wants to highlight the foundation of universal human rights. Dworkin, according to Perry, has failed

to show “that either a secular cosmology or cosmological atheism can yield the requisite conviction about *how things really are*.”⁵² While we can certainly question whether this was ever Dworkin’s intent, we must also consider the reasonableness of Perry’s demand. Is it possible, in the end, for those who are not religious – people like Clarence Darrow or Steven Weinberg – to give to us a definitive answer about the nature of the universe and our place in it? It seems unlikely that either could provide the sort of answer that Perry desires. Their inability to do so, however, threatens to leave the contemporary human rights regime with a severely eroded foundation, for Perry insists on the intimate connection between human sacredness and human rights. In his own words: “The conviction that every human being is sacred is, in my view, inescapably religious – and the idea of human rights is, therefore, ineliminably religious.”⁵³ But what exactly is the connection between the sacredness of persons and the idea of human rights?

The question of whether there is something inherent in human beings from which our rights spring is fundamental to any attempt at understanding human rights claims. As Perry says, “The fundamental challenge to each and every human rights claim . . . is a demand for reasons.”⁵⁴ Indeed, this book began with an effort to trace the notion of grounding our rights and noted that one can look at least as far back as the Stoics in doing so. The importance of this search is nicely elucidated by Perry, who contends that:

there is something about each and every human being, simply as a human being, such that certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.⁵⁵

Despite overwhelming agreement that something about us is surely responsible for our having rights, theorists have not often been in agreement about what exactly that something might be. Enlightenment thinkers conclude that it is our ability to use reason; theologians suggest that it is our status as children of God, made in His image. And, of course, international human rights documents contend that it is our dignity that sets us apart from all of the other species.

For Perry, the foundational component of the idea of human rights is the conviction that every human being is sacred; it clearly relies, he argues, on a spiritual belief of one kind or another in order to be intelligible. Regardless of whether he is correct on that score, Perry is surely correct in saying:

The fundamental challenge to human rights claims is a real-world challenge: Many to whom such claims are addressed have conspicuously not adopted anything like “the moral (impartial, universal) point

of view". The moral point of view is not a justificatory basis for human rights claims – at least not a fundamental basis. The moral point of view is itself in dire need of justification, especially in a world – *our* world, the *real* world – that is often fiercely partial/local rather than impartial/universal.⁵⁶

His religious understanding of the sacredness of persons is an attempt at providing just such a justification. It represents, in his view, the only intelligible way to answer “what David Tracy has called the ‘limit-question’ of morality: ‘Why be moral at all?’”⁵⁷

As we have seen, Dworkin’s secular conception of sacredness fails to provide a satisfactory answer to this question. Robert Grant concludes a bit more forcefully that, “In *Life’s Dominion*, Professor Dworkin makes considerable play with, indeed frankly exploits, the idea of the sacred, but shows no understanding of it.”⁵⁸ Indeed, considerable difficulties arise over his unconventional definition of intrinsic value and over his idea that each of us holds in higher esteem one of the two investments that make something sacred. In addition, and perhaps most importantly, there is the problem of subjectivity to which Dworkin’s secular sacredness falls prey. That said, it is important to avoid tossing away Dworkin’s contribution entirely. Though somewhat the worse for wear on the question of sacredness, there is a very valuable point that *Life’s Dominion* raises, namely the idea of self-creation. As discussed earlier, Dworkin argues that human life is valuable because of the creative contributions of both nature and humanity. The key component of this argument is the latter notion, the idea that each human being is created by her culture and community, as well as her own thoughts. On this point, Dworkin’s ideas are very well-articulated:

The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the . . . processes of nation and community and language through which a human being will come to absorb and continue hundreds of generations of culture and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creature who faces the same frightening challenge.⁵⁹

Put succinctly, each human life is inherently valuable because human beings are self-creating; they are, in Dworkin’s view, a source of value in the way that God or nature might be for others. Dworkin, then, offers an

interesting contribution about the possibilities of human creativity and his work is valuable to our discussion if only for that.⁶⁰ More than that, though, the task that Perry assigns to non-religious theorists (and that Dworkin sets for himself) – of providing a coherent secular understanding of a deeply religious concept – may very well be an impossible one and Dworkin’s failure in this respect should not be emphasized excessively.

While we have already looked, in detail, at these challenges to Dworkin’s theory and at the problem of secularizing the concept of sacredness, we have not dealt with Perry’s understanding of sacredness in its entirety. A crucial point left for us to consider is that Perry’s conception of human sacredness can be said to encompass a number of the aforementioned “somethings” on which our rights rely. More specifically, Perry suggests that rights claims all rely on the notion that human beings are sacred, which is – in turn – based on the idea that we are the children of God. In addition, Perry contends that the sacredness of persons can be equated with the concept of inherent dignity that is highlighted in the Universal Declaration of Human Rights. His contention, however, is merely implied, for Perry puts the two together only once – in a question – at the very beginning of his argument:

Or must we conclude that the idea of human rights is indeed ineliminably religious, that a fundamental constituent of the idea, namely, *the conviction that every human being is sacred – that every human being is “inviolable”, has “inherent dignity”, is “an end in himself”, or the like* – is inescapably religious?⁶¹

Perry seems to suggest that dignity and sacredness are, in fact, synonyms for one another. But this is too large an assumption, in my estimation, and too much hinges on it. Put succinctly, Perry wants to demonstrate that the sacredness of persons can only be understood religiously. Doing so, he claims, will mean that the idea of human rights is ineliminably religious. He fails to show, however, how it is that sacredness is necessarily connected to the idea of human rights; it is, instead, one of many possible foundations. Simply putting all of these possibilities together and implying that they are derivative of human sacredness does not properly constitute an argument.

In a later chapter of his book, Perry is more forthcoming about his view of the connection between international law and the sacredness of persons. Indeed, he argues that the former is clearly derived from the latter:

Why is the good of every human being an end worth pursuing in its own right? One answer – the answer that informs the international law of human rights – is that the good of every human being is an end worth pursuing in its own right *because every human being is sacred*.⁶²

The problem, however, is that none of the international human rights documents actually use this term. In fact, the language he examines from the International Bill of Human Rights does not contain the word “sacred” anywhere. As Perry himself notes:

The . . . Universal Declaration of Human Rights (1948), speaks, in the Preamble, of “the inherent dignity . . . of all members of the human family” and of “the dignity and worth of the human person”. In Article 1, the Declaration proclaims: “All human beings . . . should act towards one another in a spirit of brotherhood”. . . . The preamble common to both [the International Covenant on Civil and Political Rights (1976) and the International Covenant on Economic, Social, and Cultural Rights (1976)] echoes the Universal Declaration in speaking of “the inherent dignity . . . of all members of the human family”. The preamble then states: “[T]hese rights derive from the inherent dignity of the human person”⁶³

It is obvious that the idea of human rights, as understood in contemporary international documents, is based on the inherent dignity of persons. It is not immediately clear, however, where sacredness comes into the picture. Indeed, there is no mention of the sacredness of human beings in any international human rights document, and it is not necessarily the case that dignity and sacredness can be equated in the way that Perry assumes them to be.

In addition to suggesting that dignity and sacredness are intimately connected, Perry further implies that dignity is a religious concept. “What are we to make of such talk,” he asks, “talk about ‘the inherent dignity’ of all human beings . . . and about the importance, therefore, of all human beings acting toward one another ‘in a spirit of brotherhood’? It is easy enough to understand such talk as *religious* talk.”⁶⁴ And Perry is not alone in conflating these terms and assigning the same religious origin to both. Murphy makes the same connection and, like Perry, does not offer an explanation for doing so: “The rich moral doctrine of the sacredness, the preciousness, the dignity of persons cannot in fact be utterly detached from the theological context in which it arose and of which it for so long formed an essential part.”⁶⁵ But should we assume that human dignity has the same theological foundation as human sacredness? In other words, are Perry and Murphy correct? Is the inherent dignity of persons just as religious (or religious in the same way) as the sacredness of persons? Perry goes to great lengths to suggest that sacredness is a fundamentally religious concept, but he has done nothing to conclusively show that dignity is similarly religious. If sacredness and dignity are not synonymous with one another, then Perry has not demonstrated that the idea of human rights is ineliminably religious. A brief glance at the language of the International Bill of Rights shows that dignity is clearly bound up with the concept of

international human rights, but not necessarily sacredness; the latter, according to Perry, is an inextricably religious concept, but the former has not been similarly evaluated.

Indeed, Australian philosopher Raimond Gaita suggests that these concepts cannot be used interchangeably and do not carry the same weight. He does, however, agree with Perry that sacredness is a fundamentally religious concept and far more powerful than dignity. He notes:

Only someone who is religious can speak seriously of the sacred, but such talk informs the thoughts of most of us whether or not we are religious. . . . If we are not religious, we will often search for one of the inadequate expressions which are available to us to say what we hope will be a secular equivalent of it. We may say that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable rights, and, of course, that they possess inalienable dignity. In my judgment these are ways of trying to say what we feel a need to say when we are estranged from the conceptual resources we need to say it.⁶⁶

While I am quite sympathetic to Gaita's position throughout *A Common Humanity*, there is a problem that arises from the way in which he stakes out this particular argument, namely that the five examples of secular – and weak – versions of sacredness are not themselves synonyms. On my reading, Gaita seems to be lumping together actions and reasons for those actions. There is, for example, a clear discrepancy between the notion that “all human beings are inestimably precious” and the idea “that they are owed unconditional respect.” Inestimable preciousness and inalienable dignity are similar, possibly secular, versions of the idea that people are sacred; the notion that people are owed unconditional respect and possess inalienable rights belong to an entirely different category. The difference is that the former concepts are the reasoning behind our believing the latter concepts. Indeed, the notions of sacredness and dignity are so vitally important precisely because of this difference; they provide the justification for our believing in the idea of human rights and the reason for our insistence that others act toward every human being as we do. While this is problematic, however, a more pressing issue is whether Gaita or Perry is correct about the separation of dignity from sacredness. To untangle that question, it is necessary to gain a deeper understanding of both terms and it is to their etymological roots that we now turn.

The etymology of rights

The Oxford English Dictionary lists seven definitions of “sacred,” ranging from those that typically come to mind (“Secured by religious sentiment,

reverence, sense of justice, or the like, against violation, infringement, or encroachment” and “Regarded with or entitled to respect or reverence similar to that which attaches to holy things”) to those that are a bit more obscure (“Of the Eucharistic elements: Consecrated” and “Applied as a specific defining adj. to various animals and plants that are or have been considered sacred to certain deities”).⁶⁷ Indeed, there are only two definitions that do not make reference to religion or a deity: first, “Accursed [After L. *sacer*; freq. translating or in allusion to Virgil’s *auri sacra fames* (*Æn.* III. 57)]” and, second, “Dedicated, set apart, exclusively appropriated to some person or some special purpose.”⁶⁸ The former provides us an opportunity to look into the Latin root, *sacer*, which – depending on context – could mean either “dedicated, consecrated, devoted, sacred,” “Accursed, execrable, detestable, horrible, infamous,” or “Regarded with reverence, holy, awful, venerable.”⁶⁹ There is, to be sure, something strange about using the same word to mean both accursed and holy, but solving that mystery is not our present purpose. Instead, it is sufficient to note that the Latin root of a non-religious definition returns us to religious language. Having done so, we can turn to the second of the two non-religious definitions. While it is not explicitly clear, with this definition, what might make “some person or some special purpose” sacred, a look at all of the other definitions of “sacred” seems to suggest that a relationship with a deity is most likely the source.

Having looked at the term “sacred” and noted the clear connection to “holy” and “religious” words in both English and Latin, it remains to us to consider “dignity” in the same manner. *The Oxford English Dictionary* contains eight possible definitions, ranging once again from the very obvious (“The quality of being worthy or honourable; worthiness, worth, nobleness, excellence” and “Nobility or befitting elevation of aspect, manner, or style; becoming or fit stateliness, gravity”) to the very obscure (“A situation of a planet in which its influence is heightened, either by its position in the zodiac, or by its aspects with other planets” and “The term for a ‘company’ of canons”).⁷⁰ None of the definitions makes reference to the concepts of sacredness, holiness, or religion. Similarly, exploring the Latin root, *dignus*, does not help to connect sacredness and dignity; it is defined as “worthy, deserving (in a good or ill sense), of things, suitable, fitting, becoming, proper.”⁷¹ The Latin, in turn, can be traced back to the Greek δόξα, which is defined as “expectation, notion, judgement, whether well grounded or not” or “the opinion which others have of one, estimation, repute.”⁷² The only connection between “dignity” and “sacred” can be found in an obscure definition of “dignified,” which usually is defined as “Invested with dignity; exalted” or “Marked by dignity of manner, style, or appearance; characterized by lofty self-respect without haughtiness; stately, noble, majestic.”⁷³ The obscure definition, “Holding a position of dignity; ranking as a dignitary (esp. ecclesiastical),”⁷⁴ does provide a connection, albeit a very tenuous one, to a religious understanding of dignity.

Despite the fact that “dignified” once suggested that the clergy were highly ranked in society, the concept of dignity seems, on the whole, not to be related to the idea of human sacredness. Something is held sacred in virtue of a clear connection to some other holy thing. Sacredness can apply to objects as well as to people, and it provides the foundation for inviolability. In other words, human beings ought not to be violated because of their connection to the divine; likewise, human beings ought to be respected in much the same way that God is respected. The value of the object – in this case, a person – is fixed because of its unchanging relationship to the source of all value, God. The concept of dignity, conversely, applies only to people and, traditionally, only to a certain sort of person. It is, traditionally understood, an aristocratic concept. Unlike sacredness, which applies to all of the objects that are related to God, one must be worthy, noble, or honorable in order to be considered a bearer of dignity. One’s dignity is, it seems, based on what others think; in that sense, it is very much a subjective concept, as it is open to interpretation by definition. That said, it is important to note that our understanding of dignity has changed considerably in the last 200 years. Prior to the revolutions in America and France in the eighteenth century, dignity and its attending esteem were strictly reserved for members of the nobility. With the collapse of the belief that a fraction of the populace was born into a position of greater worth, the concept of dignity underwent a considerable expansion. The Glorious Revolution of 1688–1689 provided a great deal of support to the idea that people might rightfully oppose a tyrannical government, but the American and French revolutionaries were the first to draw up a list of specific rights that applied, they said, to all men.⁷⁵

While the United States Declaration of Independence states that “all men are created equal”⁷⁶ and the French Declaration of the Rights of Man and Citizen declares that “Men are born and remain free and equal in rights,”⁷⁷ neither makes mention of human dignity as the basis for this belief. And, perhaps not surprisingly, neither Declaration went to great lengths to ensure that the equality of rights applied equally to everyone. Clearly, the problem of slavery was not dealt with at the time of the signing of the United States Declaration, nor would it be dealt with in the lifetimes of the men who signed it. And, of course, the promulgation of the French Declaration was followed almost immediately by Robespierre’s Terror and the execution of thousands by guillotine (including, eventually, Robespierre himself). Only ten years after proclaiming the Rights of Man and Citizen, political control over France was seized by Napoleon Bonaparte.

Despite what can graciously be termed serious problems of implementation, both the American and French Declarations are unequivocal in the principles that serve as their guide. In addition, the French revolutionaries provide support for the connection between human rights and sacredness, stating that they “have resolved to set forth in a solemn declaration the

natural, inalienable, and sacred rights of man.”⁷⁸ And yet, despite the use of Perry’s terminology, it is important to note that it is the *rights* that are sacred and not the *people*. Indeed, it is a bit of a mystery as to the reason behind the sacredness of the rights, which seems not to reside in the inherent equality of the people; this second concept, after all, requires a foundation of its own. It makes the most sense to assume that all men possess equally the sacred rights of “liberty, property, security, and resistance to oppression” because of their (unstated) connection to “the Supreme Being” “in the presence and under the auspices of [whom]” the rights were affirmed by the French National Assembly.⁷⁹ A similarly nondescript “Creator” appears in the American Declaration as well, and is very clearly the source of man’s “certain unalienable rights.”⁸⁰ Of primary importance to both the American and French Declarations, though, are the rights themselves, not their ultimate guarantor, because their infringement provided a rallying cry for the revolutions and their protection was at the heart of the radical democratic experiment that the revolutionaries proposed. And, in fact, both revolutions promised to usher in an era of hitherto unimagined civil peace and religious tolerance, based on the complete absence of a state-sanctioned religion.⁸¹

Still the questions remain, how and why the change from “natural, inalienable, and sacred rights” protected by a Supreme Being to the contemporary notion of the inviolability of persons based on their inherent dignity? I submit that a primary reason for the change is that, historically, the rights have not been held in practice to be particularly sacred. The United Nations Charter seems to bear this idea out:

We the peoples of the United Nations determined
to save succeeding generations from the scourge of war, which twice
in our lifetime has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and
worth of the human person . . .
Have resolved to combine our efforts to accomplish these aims.⁸²

Likewise, the Universal Declaration of Human Rights begins by noting that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”⁸³ Given the propensity that human beings have had, especially in the last century, for violating the rights enshrined in the American and French Declarations, the United Nations proposed a new way of understanding the duties that governments had to their citizens and, conversely, the rights those citizens could claim.⁸⁴ According to William Schulz, “What the Universal Declaration supplies all of us are rights in the form of norms to which every person can appeal, rights that . . . are designed to depict the best way we know of at the moment to counter cruelty and build a decent society.”⁸⁵ Indeed, a statement by Eleanor Roosevelt, who chaired

the Human Rights Commission that drafted the Universal Declaration, does much to confirm that its drafters appreciated the Declaration's revolutionary character:

We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. . . . This Declaration may well become the international Magna Carta of all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States, and adoption of comparable declarations at different times in other countries.⁸⁶

In addition to this statement by Roosevelt, Charles Malik – the Lebanese philosopher and politician who ultimately shepherded the Declaration through the General Assembly – lends support to the idea that the community of nations stood on entirely new ground as it considered a rights instrument with the support of the entire world behind it. According to Malik:

Thousands of minds and hands have helped in its formation. Every member of the United Nations has solemnly pledged itself to achieve respect for and observance of human rights. But, precisely what these rights are we were never told before, either in the Charter or in any other international instrument. This is the first time the principles of human rights and fundamental freedoms are spelled out authoritatively and in precise detail. I now know what my government pledged itself to promote, achieve and observe when I had the honor to sign the [UN Charter]. I can agitate against my government, and if she does not fulfil her pledge, I shall have and feel the moral support of the entire world.⁸⁷

Proposing such a list, however, is not the same as suggesting that the enumerated rights and the human dignity underlying them are objectively true. As Schulz argues:

The question to ask about rights is not, Are they true? The question is, Do they work? Do they work to spread empathy, combat cruelty, and protect the weak from their oppressors? The experience of the international human rights community is that these do.⁸⁸

Such an argument, though, seems to leave the idea of human rights on shaky ground; it is akin to admitting that, in fact, human rights might be a fad that could just as well not be in fashion tomorrow. Indeed, Schulz recognizes this problem:

Such a concept of rights does not lend them the kind of irrefragable authority that God's will or Nature's command might. Theoretically, the Universal Declaration could be rescinded or amended. Human concepts of rights *do* change and there is no reason to believe that today's notions and norms will be identical to those of the twenty-second century any more than our norms are identical to those of the nineteenth.⁸⁹

This argument – that the idea of human rights and the human dignity that grounds it is constructed and, therefore, changeable – is one that is anathema to both Michael Perry and Ronald Dworkin, as both argue for the importance of a transcendent foundation for rights, one that is ultimately grounded in some feature or quality of humanity. The non-religious foundation that Dworkin proposes, however, is flawed for a variety of reasons, not the least of which is that it misunderstands the concept of sacredness on which it is based. But the task that he sets for himself and that Perry argues he fails to complete seems to me to be one that is both impossible and unnecessary. It is impossible, I have argued, because the idea of secular sacredness is one that cannot be made sense of; it is unnecessary, I believe, because the concept of sacredness is not required to ground the idea of human rights in the way that Perry suggests. It is, instead, human dignity upon which the International Bill of Rights stands and it is possible that the concept of dignity for all humanity is a very recent development. Schulz, who is both a theorist and a practitioner of human rights, embraces the idea that we have recently established the ground upon which our rights stand and contends that this seemingly tenuous position need not dull the luster of human rights. While this theory might not provide the sort of objectively strong defense that Perry requires, it is clear that no truly non-religious theory will be able to do so because any such theory seems to lack the objectivity that religious theories claim.

4 Human dignity without teleology

Human rights and evolutionary biology

There has been no shortage, in recent years, of debate on the subject of human dignity. In particular, much ink has been spilled – and much legislative wrangling has taken place – in an attempt to clarify what it means to die with dignity. Behind this puzzle lies one that is more fundamental, namely what it means to have dignity at all. This, it seems to me, has as much to do with life as it does with death. And, I want to suggest, piecing together this puzzle will yield a great deal of information on what we mean when we talk about human persons and human rights. For bound up with the question of human dignity is the question of what constitutes the human person who is the subject of the dignity and, consequently, the rights. The recent dispute surrounding Terri Schiavo, a Florida woman in a persistent vegetative state (PVS) whose husband sought to remove the feeding tube that kept her alive and whose parents were opposed to doing so, is a good indicator that these issues remain very much unresolved. The Schiavo case received an amazing amount of attention from the media, politicians, and the populace – far more, for example, than the humanitarian crisis taking place in the Darfur region of Sudan at the same time. While few people in the USA could find Darfur on a map, it would be nearly impossible to find someone without an opinion on Schiavo's medical care. And the reason for all the attention is quite clearly that there were two opposing camps with the exact opposite opinion about what ought to be done: either keep her alive with the assistance of a feeding tube or remove the tube and wait for her to die. The Schiavo case prompted people to ask themselves whether they would want to remain alive with the aid of machines and it reopened the national debate that swirled around the similar cases of Karen Ann Quinlan in the 1970s and Nancy Cruzan in the late 1980s.

This debate about the end of life mirrors the one about the beginning of life. Just as we remain uncertain about Terri Schiavo's rights, we remain sharply divided on the question of whether fetuses may be aborted and, if so, at what stage of pregnancy it becomes impermissible to do so. In other words, we have not – as yet – conclusively decided when a person becomes a person or when a person stops being a person. Consider, for example,

this description of a PVS patient from a recent *New York Times* op-ed piece:

In a persistent vegetative state, the cerebral cortex has been destroyed, leaving the person incapable of thought or memory, but the brainstem remains intact and functional. A person in a persistent vegetative state can live for years without a mechanical ventilator or other technological support.¹

The question to be addressed, one which the authors, Gary Kalkut and Nancy Neveloff Dubler, do not consider, is in what sense the PVS patient is a person. How can we speak of a person if the PVS patient is lacking a functional cerebral cortex? In the same op-ed, Kalkut and Dubler point to Schiavo's situation and note that "There was no question that she was alive. Her heart and lungs received signals from her brainstem – they didn't need machines to sustain their activity."² But, again, this begs the question with which we are concerned; without thought or memory, without a functioning cerebrum, what is it about the patient that makes her a person? Specifically, in this case, in what sense should the patient who was alive, whose heart and lungs were functioning, be considered Terri Schiavo? It seems to me of fundamental importance to address this problem because, I want to argue, Terri Schiavo and the PVS patient who was Terri Schiavo are not the same.

But what makes Terri Schiavo – or Karen Ann Quinlan or Nancy Cruzan or any of us – different from a PVS patient? Asking this question is not the same as asking whether we are alive, for PVS patients are obviously alive in the sense that they have cardiopulmonary function and brainstem activity. What it asks, instead, is what makes us *us*? Answering this question requires creating a distinction, one to which I will return later in this chapter, between human animals and human persons.³ The former, I want to suggest, are lacking in some important respect and the latter are not; to be a pre- or post-person is to be not quite all that one can be. The PVS patient is very much a post-person, just as some fetuses are pre-persons, and we make a mistake in failing to recognize what they lack in comparison, for example, to the coma patient or the infant. But what accounts for this difference? What makes someone specifically a person rather than merely an animal? In this chapter, I turn to evolutionary biology to make an argument about the primacy of dignity in differentiating between human animals and human persons.

Such a suggestion about deriving dignity from an argument about human nature raises at least two concerns. First, my argument runs headlong into a heated debate about whether there is any such thing as human nature in the first place. There are those who believe that an understanding of evolutionary biology undermines many – if not all – of the traditional philosophical and theological arguments about human nature. While I

believe I can answer this objection without a great deal of difficulty, I will have a bit more trouble with the second concern, a philosophical puzzle that Michael J. Perry highlights in a recent article: “For one who believes that the universe is utterly bereft of transcendent meaning, why, in virtue of what, does every human being have inherent dignity?”⁴ This is a particularly challenging question, I think, and it clearly lies at the center of this chapter. Perry’s disbelief in the prospects of successfully navigating this terrain notwithstanding, I believe that a compelling answer to this problem can be arrived at by looking outside the fields of philosophy, political science, or public policy in which these sorts of arguments are typically concentrated.

That the concept of human dignity might be derived from evolutionary principles undoubtedly invites a great deal of skepticism from a great many sources on both sides of the political divide. Clearly, there will be some strong resistance to this sort of theory from those who believe evolutionary biology wrongheaded in the first place. But any perceived connection to an argument grounded in what might be termed sociobiology is enough to get me into some trouble with even those who claim to be non-religious, as evolutionary biologists and psychologists have been the well-used whipping-boys of the academy for a couple of decades now precisely because of their adherence to a theory of human nature. As Steven Pinker notes:

For invoking nurture *and* nature, not nurture alone, these authors have been picketed, shouted down, subjected to searing invectives in the press, even denounced in Congress. Others expressing such opinions have been censored, assaulted, or threatened with criminal prosecution.⁵

There is something about such an argument that does not sit well with many of those in the Humanities and Social Sciences; in particular, I think, an argument that makes claims about human nature and that attempts to sort out what people might have been like in some sort of “ancestral environment” sends many in the academy into fits. Listen, again, to Pinker on this point:

When it comes to explaining human thought and behavior, the possibility that heredity plays any role at all still has the power to shock. To acknowledge human nature, many think, is to endorse racism, sexism, war, greed, genocide, nihilism, reactionary politics, and neglect of children and the disadvantaged. Any claim that the mind has an innate organization strikes people not as a hypothesis that might be incorrect but as a thought it is immoral to think.⁶

I well understand this reaction, however; sociobiology has, after all, been put to nefarious use in the past and it would not be overly difficult to do

so again. And yet, I want to argue that a discussion of human universals or a detailed account of the way the mind works will not yield the sort of problem that many of my colleagues might assume. Rather than highlighting the differences between races or sexes, then, I think we might be able to tell a plausible story about our common humanity that draws out an argument about dignity from the principles of evolutionary biology.

Human beings are complex animals, to be sure. And while we do not yet have a full appreciation of all our internal workings, we are making significant progress in many areas. Consider, for example, the project of mapping the human genome and the many recent advances in neuroscience, like neuropharmacology. Though our knowledge remains incomplete at present, I want to argue that the information we have begun to compile about the human mind can yield some interesting conclusions about the idea of human dignity. In the first section of this chapter, I briefly construct an argument for a human nature that is rooted in evolutionary biology. Having done so, the second section will make a case for locating personhood in the human mind; in particular, I consider arguments in favor of and against linking personal identity with either higher- and whole-brain activity. In the third section, I return to this brief discussion of PVS patients, fetuses, and persons with a view to sorting through some possible sources of personhood. The final section will offer a resolution to these controversies – which David DeGrazia calls “the boundaries of our existence”⁷ – and, in so doing, will demonstrate the priority of dignity to personhood. Ultimately, I will argue that an intelligible grounding for human dignity – itself a foundational component of human rights – can be arrived at through an argument about the way our minds function; more specifically, I contend that dignity is a feature of higher-brain activity and, in making this case, I provide one possible answer to Perry’s question, quoted earlier, about how a non-religious person – one who embraces evolutionary theory – might arrive at the concept of human dignity.

The evolution of human nature

For many people in the United States, there is no question that humans have a distinct nature; by and large, ours is a nation of believers and one of the most fundamental beliefs is that humanity was created in the image of God. This position holds that our special status among the created beings derives from our relationship with God; the intricacies of the human mind – with which this chapter is concerned – are instilled in us by Him, largely to assist us in contemplating and serving Him. All of this is relatively unproblematic – unless one puts more weight on the discoveries of modern science, which are often directly at odds with the biblical account of creation and, consequently, human nature. As science seemed to put the lie to the Bible on things like the age of the Earth or its position in the universe, many began to wonder what it meant to be human absent a special rela-

tionship with God. For the faithful, an acceptance of evolutionary biology and a rejection of the Bible yields a universe without design, one in which the rise of *homo sapiens* occurred by chance and to no particular end. In such a world, there is nothing special about humanity, it is an absurdity to talk about morality, and, as a result, any action is permitted.⁸

I want to suggest that one reaches this conclusion only through a mistaken understanding of evolutionary biology; indeed, few non-religious people today have jettisoned the idea of human nature entirely and, interestingly, evolutionary biologists and psychologists are today championing a more meaningful understanding of human nature.⁹ Their struggle against the theory of human nature that has been the most popular amongst non-religious intellectuals – the Blank Slate – is the topic of this section, as it is my goal to highlight the possibility of a robust non-religious theory of human nature. To begin, a simple definition is in order; the Blank Slate, following Pinker, is “the idea that the human mind has no inherent structure and can be inscribed at will by society or ourselves.”¹⁰ Though it gained most of its ground in the twentieth century, the idea can be traced back to John Locke, who argued against “theories of innate ideas in which people were thought to be born with mathematical ideals, eternal truths, and a notion of God.”¹¹ Then, as now, the doctrine of the Blank Slate was a progressive one; its more recent adherents were responding to social and political philosophies that saw racism and sexism as inevitable consequences of accepting evolutionary biology. By way of response, American intellectuals argued that behavior was shaped by a person’s surroundings – by culture – rather than by natural forces. Arguments about the genetic inferiority of women or Jews or blacks – or any other targeted group – were dismissed and, in their places, adherents of the Blank Slate agreed with Margaret Mead “that human nature is almost unbelievably malleable, responding accurately and contrastingly to contrasting cultural conditions.”¹² And so the argument raged – back and forth – between those who argued in favor of human nature, based on our understanding of genetics, and those who claimed that the only feature of humanity’s nature was its plasticity. Francis Fukuyama nicely sums up this nature/nurture warfare, saying:

The dubious pedigree of hereditarian arguments cast a pall over most discussions of genetics during the second half of the twentieth century. Progressive intellectuals were particularly intent on beating back arguments about nature. This was not only because natural differences between groups of people implied social hierarchy, but also because natural characteristics, even when universally shared, implied limits to human plasticity, and hence to human hopes and aspirations.¹³

Lest anyone infer from this quotation that one of my goals is to maintain or strengthen societal hierarchies, let me clearly state my opposition to the

misuses to which evolutionary theories have been put. That said, I don't think one should embrace a theory like the Blank Slate when it seems obviously wrong. Nor should one ignore the study of genetics simply because it might lend weight to the idea that there are natural differences between people. Indeed, a more careful reading of the literature suggests that we have much more in common – our human nature – than the obvious differences (like gender, religion, or skin color) would suggest.

None of this – or what follows – should be read as solving the nature/nurture debate in favor of nature alone, for that is not at all my intention. Indeed, all of this talk about human nature does not invalidate the obvious importance of environmental factors to human behavior; it only suggests that the Blank Slate – the idea that humans are entirely cultural beings whose only nature is a malleable one – does not make the most sense, especially in the face of modern genetics and neuroscience. As Pinker notes:

In some cases, an extreme environmentalist explanation is correct: which language you speak is an obvious example, and differences among races and ethnic groups in test scores may be another. In other cases, such as certain inherited neurological disorders, an extreme hereditarian explanation is correct. In most cases the correct explanation will invoke a complex interaction between heredity and environment: culture is crucial, but culture could not exist without mental faculties that allow humans to create and learn culture to begin with.¹⁴

In short, culture still counts for a lot and there is variation among cultures – but the existence of culture requires a common human nature that stems from our brains and the genes that make them.

That caveat out of the way, one thing that still remains to be considered is exactly what about the Blank Slate is so wrong. There are myriad problems with the doctrine of the Blank Slate, but I will limit my critique to only two of the most obvious.¹⁵ The first is that “*The mind cannot be a blank slate, because blank slates don't do anything.*”¹⁶ While it remains unclear exactly how much software comes with our mental hardware, it is obvious that some software is needed in order for us to perform the complex functions of which we are capable. As Pinker notes:

Cognitive modelers have found that mundane challenges like walking around furniture, understanding a sentence, recalling a fact, or guessing someone's intentions are formidable engineering problems. . . . The suggestion that they can be solved by a lump of Silly Putty that is passively molded by something called “culture” just doesn't cut the mustard.¹⁷

We know that humans learn a great deal over the course of a lifetime, but clearly “there can be no learning without the innate circuitry to do the

learning.”¹⁸ This is not a particularly new idea; it dates back at least as far as Leibniz, whose critique of Locke’s theory of human understanding was that “There is nothing in the intellect that was not first in the senses . . . except the intellect itself.”¹⁹

The second problem is based on the idea of natural selection and points out that “The mind was forged in Darwinian competition, and an inert medium would have been outperformed by rivals outfitted with high technology.”²⁰ If the human mind were simply a Blank Slate, we would have fallen victim to all sorts of problems and likely would not have made it very far. There are a great many challenges in the world, not the least of which involve maintaining ourselves, and we desperately need our big, complex brains to accomplish tasks like locating sustenance, fashioning shelter, and avoiding predators. That is, of course, to say nothing of our need to find a suitable mate and successfully produce offspring. An inability to do so spells disaster, not only for ourselves but for our genes – and so the evolutionary importance of a brain that is hard-wired to do these things becomes immediately apparent.

While all of this suggests that the doctrine of the Blank Slate fails to properly explain the human mind, very little has been said about human nature. How do genetics and neuroscience help make that case? Precisely because “the mind no longer looks like a formless lump pounded into shape by culture,”²¹ there is more space opened up for an argument about human universals and for the human mind as the ultimate grounding for all that is common to humanity. Indeed, as the arguments against the Blank Slate have implied, the going scientific hypothesis is that “the mind evolved with a universal complex design.”²² Such a mind accounts far better for our ability to learn, as well as our ability to survive (and even thrive) in a quite hostile ancestral environment. Lending weight to this theory, “Child psychologists no longer believe that the world of an infant is a blooming, buzzing confusion, because they have found signs of the basic categories of mind (such as those for objects, people, and tools) in young babies.”²³ The mind, it seems, comes equipped with quite a lot of software because waiting for much of it to get loaded – through the learning process – would have unsatisfactory evolutionary consequences. Further, “Archaeologists and paleontologists have found that prehistoric humans were not brutish troglodytes but exercised their minds with art, ritual, trade, violence, cooperation, technology, and symbols.”²⁴

And while this knowledge is helpful in constructing a picture of the mental hardware that is common to us all, anthropological work on diverse cultures has provided even more evidence to suggest a common human nature that arose as a result of the complex human mind. As Pinker points out, “Hundreds of traits, from fear of snakes to logical operators, from romantic love to humorous insults, from poetry to food taboos, from exchange of goods to mourning the dead, can be found in every society ever documented.”²⁵ Given this information, what sort of

nature are we actually talking about? Quite clearly, it is not one that does the same sort of work as the religious account; it does not suggest that all human life is sacred because each individual bears the divine imprint. Nor is it “a nature that is rigidly programmed, impervious to the input, free of culture, or endowed with the minutiae of every concept and feeling.”²⁶ Instead, it is one that is built on the human mind and, consequently, it cannot even suggest that all humans will always be equipped with it. But that, of course, does not make it any less correct nor does it make it any less a human nature. Indeed, Pinker argues that “it is a nature that is rich enough to take on the demands of seeing, moving, planning, talking, staying alive, making sense of the environment, and negotiating the world of other people.”²⁷ And, as I will argue in the next section, it is rich enough to provide us with a way to talk about the concept of human dignity upon which our contemporary understanding of human rights might stand.

Personal identity and the mind’s “I”

I have thus far tried to make a case for deriving human nature from the evolution of the universal complex human mind. Much more needs to be said, however, to demonstrate that the concept of human dignity is part of our hard-wiring. While it would likely be simple enough to suggest that humans – across cultures – understand the concept of dignity, I want to argue that humans have more than an understanding of the concept; we actually *have* the dignity. Since I have been suggesting to this point that, put succinctly, what you see is what you get when it comes to humanity, the challenge is to locate dignity somewhere within us. Bound up with this problem is one that I alluded to very briefly at the end of the previous section, one that a religious vision of human nature does not face. When we ground human nature – and human dignity – in the mind, we might be suggesting that only some human lives – those with properly functioning minds – have our nature and our dignity. Those whose minds have either stopped or haven’t begun working might not be included. This will clearly be a troubling conclusion for many and it is one that must be examined fully. Doing so, I believe, will shed a great deal of light on what it means to have dignity and, therefore, what it means to be a person. Perhaps the most useful tool for examining the distinction between those human lives with dignity and those in which dignity is lacking is personal identity theory, about which much has been said in the philosophical literature. I will offer a brief rehearsal of the main approaches to the question of personal identity – psychological and biological – with a view to sorting out what we mean by personhood. My argument, ultimately, is that a variant of the biological approach is more compelling than any of the various psychological approaches to personhood precisely because it affords a place for the concept of dignity in making its case.

As might be expected with such a basic and fundamental question as

what constitutes personhood, there is great deal of disagreement on the answer. By and large, though, the psychological approach has enjoyed pride of place in much of the literature. In describing this mainstream approach, David DeGrazia says that it “comprises various theories that assert that our identity – or continuing existence over time – is (at least partly) a function of psychological continuity.”²⁸ Although there is a good deal of variation within the psychological approach, I will confine my discussion to the standard version here. The standard account of personal identity begins from a very unusual premise: what would happen, theorists ask, if your cerebrum were somehow transplanted into someone else’s body? Would you go with your cerebrum into the new body, would you stay in your old body, or would you cease to exist entirely? And what, of course, would happen to your old body once your cerebrum was removed?²⁹ While all of this is obviously a bit fanciful, there are much more realistic thought experiments that have developed along this line: what would happen to you, for example, if you had a brain injury and, as a result, entered PVS? Would you, in that case, still be yourself or would you cease to exist, despite your body’s continued existence? The intuition that drives the psychological approach to personal identity “is the hunch or feeling, the *pull* towards saying, that one survives in the transplant story as the offshoot who gets one’s cerebrum.”³⁰ Similarly, in the more practical account, the intuition would be that one’s identity does not survive PVS. As Jeff McMahan correctly notes, “a person ceases to exist when it ceases to be the case that there will be someone existing in the future with whom he will be psychologically continuous.”³¹ While this conclusion seems right to me, I take issue with the reasoning used by adherents of the psychological approach to arrive at it. This reasoning is based on two arguments: “Our identity is a function of psychological continuity and we are essentially persons.”³² The first argument is clear enough from the transplant and PVS thought experiments; this continuity is based either on “*experiential connections*, such as having an experience and later remembering it, or forming an intention and later fulfilling it” or “on the continuation of *basic psychological capacities*.”³³ The second argument, DeGrazia explains, is based on “the thesis that we, who are now human persons, are *essentially* persons – beings with the capacity for complex forms of consciousness – and therefore cannot exist at any time without being persons at that time.”³⁴

There are, in my estimation, many problems that arise from holding these two arguments; in what follows, I will consider two of the most serious. The first problem is that, on the psychological account, none of us was ever a newborn infant, given the argument about psychological continuity and personhood. Clearly, there are times in a human life when psychological continuity does not hold; in thinking about my identity, in other words, the person I am today is not strongly connected to the infant I was. I do not have experiential connections with the infant and the infant does not have the capacity for complex consciousness.³⁵ From these premises:

It follows that the two-day-old infant cannot be strongly psychologically connected with itself the day before, that there is therefore no psychological continuity in early infancy, that none of us now is psychologically continuous with a newborn infant, and thus that none of us is now numerically the same individual as a newborn infant.³⁶

But, quite obviously, each of us was – at one time – a newborn infant, despite the absence of any strong psychological connections to that infant. Of course, the infant has the capacity to become a person and, in my case, this is the happy story I will tell about my development. But this is quite different from saying that I share some sort of psychological connectedness with this infant – just as it would be odd to say that I am the same person as the fetus from whence I came – and it implies that when I began to exist, in the psychologically continuous manner in which I do, the infant ceased to exist. To get around this difficulty, one might argue that “perhaps the fetus your mother bore did not cease to exist when you came into being, but simply came to share its space and its matter with you.”³⁷ But this yields the second problem with the psychological account.

If one were to argue that the fetus – or the infant – did not cease to exist, one would be committed to the idea that there are two beings existing at the same time within the same body, the human person that is me and the human animal that is not. This second problem with the psychological account, as DeGrazia points out, is that it “has yet to produce a plausible account of the relationship between a person and the human animal associated with her.”³⁸ There is no doubt, I think, that humans are animals; whether we have divine or evolutionary origins, we tend to think of ourselves as either particularly special or clever animals – but animals just the same. On the psychological account, however, we cannot be animals because we are persons. In thinking about the possibility that the infant (the pre-person) shares its matter with me (the person), one necessarily runs into the following problem: “if you are essentially a person, you cannot *be* (identical with) the animal that precedes and may succeed you, as nothing can precede or outlast itself.”³⁹ In other words, if I am essentially a person, then there cannot be a time when I exist and am not a person. If we return to the earlier transplant story, moreover, we see the problem in even sharper focus. When we remove the cerebrum, the animal stays in place but the person is transferred to another body; in this account, the person and the animal are separable and thus the person “could not be that animal: a thing and itself cannot go their separate ways.”⁴⁰ The argument for separating persons and animals is, in my estimation, the greatest weakness of the psychological account of personal identity.

The biological account, conversely, does not face similar pitfalls and it is, I believe, a far more plausible understanding of human personhood than the psychological account. Put succinctly, the theory states that:

we human persons are essentially living human animals and the criteria for our identity are biological: Human person X at one time and any Y at another time are one and the same being if and only if X's (biological) life is Y's (biological) life.⁴¹

On this account, we avoid the problems described above because we are human animals – not something that shares space with them – and we can determine when the human animal both came into being and when it ceases to be. Unlike the psychological approach, all of this is grounded in the science of human biology rather than in abstract thought experiments. There are good reasons, after all, to think of ourselves as human animals – not the least of which is that, biologically, we actually are – and Olson argues that this line of thinking does not reduce us to the status of “*mere* animals.”⁴² Humans are a particular kind of animal, one that is capable of consciousness rather than one that exists because it is conscious. Even though we are not anything more special than that – not, for example, the rational animal or the thoughtful animal – this is nothing about which to feel ashamed. My personal identity is bound up with my being this sort of animal and I remain who I am so long as that animal lives. For Olson, then:

A human vegetable that can be kept alive with a feeding tube is still a living human animal, even though it no longer has any mental functions. A four-week-old human embryo is also a living human animal: it has its own DNA, its own closed circulatory system, its own blood type, its own immune system, and the primitive beginnings of its own nervous system.⁴³

It is a mistake, on this account, to think that I am somehow different from the animals described in these situations.

And yet, in my estimation, Olson does not spend nearly enough time discussing how consciousness fits into his theory. He does make the argument that a consequence of the biological view is that we are nothing but our bodies, but – contrary to those who suggest, for example, that it is me and not my body that is happy or sad – this does not mean we are incapable of rational thought or feelings. On this point, Olson is exactly right: our bodies *are* doing the thinking, despite the awkwardness of language that arises from saying something like, “My brain thought about your question from the other day.” The trouble for Olson arises when all of this theorizing is put into practice. Because Olson is making an argument about the priority of the whole body to personhood, I want to argue that his biological account fails to properly negotiate the difficult terrain that arises at the beginning and end of human lives. All it tell us, as DeGrazia points out, is that:

We were all mindless fetuses before we became persons, and we might again exist as nonpersons in severe dementia or even as nonsentient

beings in PVS. Thus, like childhood and adulthood, personhood represents a *phase* of our existence rather than an essential property.⁴⁴

What we need to know, at this point, is what it means to be a person because, on my reading, there is a fundamental difference between human persons and human animals even though the two are nearly the same biologically. In other words, I want to argue that the fetus that I once was and the person I now am are different in some important respect – even though they are biologically the same animal at two different stages of development. For Olson, though, this difference simply does not exist – or it exists entirely in our heads. It will be helpful to quote Olson at some length on this point:

Some find it strange to say that *I* was once an unthinking embryo. “I” is a personal pronoun, they point out, and calling something by a personal pronoun, unless we are speaking loosely, as we do with ships and pets, implies that it is a person, that is, a rational, self-conscious being. The embryo is not an “I”, but an “it”. So we cannot sensibly ask *who* a fetus is, since that is to ask which person it is, and a fetus is not a person The problem of how to talk about the way I was or may come to be when not a person is no more serious than the problem of how to talk about someone who has had or is planning a sex change operation. When a man has such an operation, we refer to him afterwards as “she”, and talk about the things she did when she was a man. While this may be grammatically awkward, it is hardly reason to think that it is impossible to change one’s gender. And what goes for “he” and “she”, I think, goes for “I” and “it” as well.⁴⁵

While Olson is right to point out the grammatical difficulty, doing so highlights the category mistake he is making. Unless by “woman” we mean a human being with a vagina instead of a penis, a man who undergoes a sex change operation does not actually *become* a woman; he has simply altered his sexual characteristics through surgery and hormone therapy. Similarly, a human fetus is one thing and a human person quite another, even though the former can (and quite often does) become the latter.

It is a mistake, then, to claim – as Olson does – that *we* were embryos, despite my agreement with his argument that we are the same biological animals that began as our embryos. He is right to note that:

a genuine human embryo – the multicellular organism that later becomes a fetus, an infant, and an adult – comes into being about sixteen days after fertilization, when the cells that develop into the fetus (as opposed to the placenta) become specialized and begin to grow and function in a coordinated manner.⁴⁶

He is wrong, however, to suggest that “you are the organism that comes into being then.”⁴⁷ You and the embryo are the same biological animal, but *you* will not come into being until much later in the process of fetal development. I want to depart from Olson’s biological account here, deny that personhood is bound up with whole-brain function (cerebrum and brainstem), and claim instead that identity is a direct result of higher-brain function.⁴⁸ The “you” that we’ve been talking about is, after all, entirely dependent on higher-brain function and, therefore, you and the embryo that will become you cannot be the same thing. In attempting this argument, haven’t I fallen back into the trouble, discussed earlier, of thinking that I am not my animal? Happily, I think I can avoid this problem because I don’t want to dispute the connection between myself as an adult and the embryo that became that adult. I am not suggesting that I – the human animal – was never an embryo; quite clearly, I was. Instead, I am arguing that the key distinguishing characteristic about the human animal that I am, namely the “I,” was not present at that early stage of development. But when and how does the “I” arise? The remaining sections of this chapter will consider these two questions; although there are a great many possible answers, I find only one to be particularly compelling. I will look closely at some of the possible avenues to personhood – language, autonomous agency, and basic needs – and argue that each is a necessary characteristic, but that they are insufficient without one another. Indeed, I ultimately argue for the primacy of dignity in differentiating between human animals and human persons precisely because it serves to unite these various components of personhood.

Human animals and human persons

To return to the example with which we began, it seems to me that the PVS patient and the person who became that patient are different in many ways; similarly, I want to argue that a fetus at, say, twelve weeks of gestation is quite different from the born human person that began life as that fetus. In both cases – the fetus and the PVS patient – personhood either hasn’t yet been attained or has been lost. That is all well and good, so long as a compelling case can be made for what constitutes personhood. In what ways then are PVS patients and fetuses so different from persons? Turning to the first possible source of personhood, we might say that human persons are able to use language to communicate with one another (and with themselves) and human animals are not. Might it be the case, then, that the use of language accounts for personhood? This is a plausible possibility, for as Pinker suggests, “Of all the faculties that go into the piece of work called man, language may be the most awe-inspiring.”⁴⁹ The ability to communicate, to express thoughts and feelings, is of obvious importance not just to personhood but also to the evolution of human society. Robert Wright argues, for example, that “Learning by observing,

teaching by threatening, and using sticks and stones can do a lot for a culture, but if your species hopes to get to the point of attending operas and anthropology lectures, the biological infrastructure for language is a must.”⁵⁰

Clearly, human persons make great use of language – but doing so relies on much more than just the ability to string words together. Language, ultimately, is only as useful as the human mind behind it. Pinker points out that:

we know how to interpret ambiguous headlines such as “Kids Make Nutritious Snacks,” “Prostitutes Appeal to Pope,” and “British Left Waffles on Falkland Islands,” because we effortlessly apply our background knowledge about the kinds of things that people are likely to convey in newspapers. Indeed, the very existence of ambiguous sentences, in which one string of words expresses two thoughts, proves that thoughts are not the same thing as strings of words.⁵¹

Behind our ability to speak are a host of mental processes that we typically take for granted.⁵² And, of course, if our brains stop working properly we lose – among many other things – our ability to use language. That said, it seems to me impossible that the use of language can mark the distinction between human animals and human persons. For while almost all of the avenues under consideration also rely on the human mind, the use of language is itself not distinctly human. Basic language skills abound in other species:

Bees convey the location of flowers with their famous waggle dance. Ground squirrels emit a warning call on sighting a predator, as do many birds. Ants send out chemicals that mean everything from “Invaders!” to “Food!” . . . East African vervet monkeys have several warning calls, depending on the predator; one means “snake,” one means “eagle,” one means “leopard,” and each elicits an apt response.”⁵³

On the whole, then, it seems that the use of language cannot properly account for the separation that exists between Terri Schiavo and the PVS patient that once was Terri Schiavo. For if it were sufficient we might conclude that East African vervet monkeys should also properly be recognized as human persons, given their ability to use “a symbolic code by which information is transmitted from one organism to another.”⁵⁴ The monkeys, after all, are better able to communicate with one another than are the PVS patients. While it might make sense at some point to make this case, for the moment there are very few who go so far as to suggest that these monkeys are persons like us. But this is really only half of the issue; far more important is that there are human persons who are unable to use

language. Consider the case of Helen Keller, who grew up both blind and deaf, and whose education, portrayed in William Gibson's *The Miracle Worker*, illustrates clearly the problem with using language skills to delineate personhood. Prior to her introduction to sign language, Keller was almost completely in her own world, unable to communicate:

As a result of their intense frustrations at not being able to communicate, deaf-blind children . . . throw temper tantrums, scratching, biting, hitting, and pinching other people. Helen Keller was no exception. No one had the heart to discipline her. She was willful and quick-tempered by nature and tyrannized the household.⁵⁵

Despite her inability to use language until painstakingly taught, Keller – and others in her position – are quite clearly human persons, with the full complement of emotions, thoughts, feelings, and needs. Like any other person, those without language are very different from, say, a fetus or PVS patient. Their inability to communicate has little to do with their desire to do so, and this separates them from human animals, who lack desires altogether. This brings us, then, to the second possibility described above, namely that the distinguishing feature of personhood is autonomous human agency.

The notion that personhood is contingent on autonomous agency has been a prominent feature of the philosophical landscape at least since Kant, who argued that the key feature of autonomy was the ability to act in conformity to duty. In obeying laws that we legislate for ourselves – that we arrive at through the use of reason – we are able to master our inclinations, passions, and, needs. Only in doing so are we able to demonstrate a freedom of will.⁵⁶ Since Kant, the literature on autonomous agency has grown extensively and a great deal of liberal democratic theory today is concerned with how the political community ought to respect the various choices of the autonomous agent and when those choices might be constrained. In the main, then, we all understand the basic principle of autonomy and we all see ourselves as autonomous agents. Peter Singer puts the point succinctly:

By “autonomy” is meant the capacity to choose, to make and act on one’s own decisions. Rational and self-conscious beings presumably have this ability, whereas beings who cannot consider the alternatives open to them are not capable of choosing in the required sense and hence cannot be autonomous.⁵⁷

There is no doubt that an important feature of personhood is agency, and that PVS patients and fetuses are fundamentally not autonomous agents. I weigh various options and then make choices for myself; this – in large part – makes me the person I am. Were I no longer capable of autonomous agency, you might safely say that I was no longer the same person.

Having said that, I want to argue that – in fact – autonomous agency is not the distinguishing feature of personhood. Indeed, I will go so far as to say that, despite our sense of the importance of autonomy, we are simply not the autonomous agents we think we are. Pinker suggests that:

Agents are recognized by their ability to violate intuitive physics by starting, stopping, swerving, or speeding up without an external nudge, especially when they persistently approach or avoid some other object. The agents are thought to have an internal and renewable source of energy, force, impetus, or oomph, which they use to propel themselves, usually in service of a goal. . . . Some self-propelled things, like cars and windup dolls, are artifacts. And many agents do not merely approach and avoid goals but act out of beliefs and desires; that is, they have minds.⁵⁸

I have no problem with this description of agency, nor do I want to suggest that there is any mistake in concluding that agents are goal-directed because they have minds. My problem with the concept of autonomous agency, in fact, is the same as Pinker's and I draw much of my critique of agency from his treatment in *The Blank Slate*. That is, it seems to me that the entire enterprise is a mistaken one: in thinking of ourselves as autonomous agents, we ignore a great deal of information about human biology and posit a creative fiction instead. While it is tempting to think of ourselves as autonomous choosers, doing so seems to me to be an error; there is, in fact, much evidence to the contrary.

To say that *homo sapiens* have minds, as Pinker does, is not the same as saying that *homo sapiens* are autonomous agents. Indeed, the mind does an incredible amount of work, but we go too far in saying that we make choices and the mind puts those choices into action. The reason for my hesitation is that doing so implies a self, a chooser, and there is no evidence that such a thing exists within the human body. What we know, instead, is not far from the Hobbesian argument "that 'reasoning is but reckoning'. . . . Perception, memory, imagery, reasoning, decision making, language, and motor control are being studied in the lab and successfully modeled as computational paraphernalia such as rules, strings, matrices, pointers, lists, files, trees, arrays, loops, propositions, and networks."⁵⁹ Of course, there remains an incredible amount of resistance to arguments of this sort. Dispatching with the tried and true notions of the self or the soul is not an easy task; what happens, after all, when one accepts that Cartesian mind/body dualism is mistaken, that there is no ghost in the machine, that the machine is running itself? Pinker is right when he says that:

It can indeed be upsetting to think of ourselves as glorified gears and springs. Machines are insensate, built to be used, and disposable; humans are sentient, possessing of dignity and rights, and infinitely

precious. A machine has some workaday purpose, such as grinding grain or sharpening pencils; a human being has higher purposes, such as love, worship, good works, and the creation of knowledge and beauty. The behavior of machines is determined by the ineluctable laws of physics and chemistry; the behavior of people is freely chosen. With choice comes freedom, and therefore optimism about our possibilities for the future. With choice also comes responsibility, which allows us to hold people accountable for their actions. And of course if the mind is separate from the body, it can continue to exist when the body breaks down, and our thoughts and pleasures will not someday be snuffed out forever.⁶⁰

We want very much to suggest that we are more than the sum of our parts, that what counts about us are our souls, or that we are rational choosers. “It is still tempting to think of the brain as it was shown in old educational cartoons, as a control panel with gauges and levers operated by a user – the self, the soul, the ghost, the person, the ‘me,’” as Pinker says. “But cognitive neuroscience is showing that the self, too, is just another network of brain systems.”⁶¹

In the end, the argument is that the brain is put together in a certain way, that its being put together in that manner is the result of genetic programming, and that – having been put together in such a manner – “every aspect of our mental lives depends entirely on the physiological events in the tissues of the brain.”⁶² This is not the same as suggesting that human behavior is wholly determined by our genes, that we are incapable of learning, or that we have no choices to make for ourselves. As Pinker argues:

The idea from the cognitive revolution that the mind is a system of universal, generative computational modules obliterates the way that debates on human nature have been framed for centuries. It is now simply misguided to ask whether humans are flexible or programmed. . . . Humans behave flexibly *because* they are programmed: their minds are packed with combinational software that can generate an unlimited set of thoughts and behavior.⁶³

What all of this means is not always entirely clear. Many people – even respected scientists – have suggested that subscribing to this view is akin to choosing Nazism over liberal democracy. For example, in response to E.O. Wilson’s *Sociobiology*, which included “the hypothesis that some universals (including the moral sense) may come from a human nature shaped by natural selection,”⁶⁴ renowned experts on evolution like paleontologist Stephen Jay Gould and geneticist Richard Lewontin attached their signatures to a letter in the *New York Review of Books* denouncing Wilson’s book. According to the letter:

The reason for the survival of these recurrent determinist theories is that they consistently tend to provide a genetic justification of the *status quo* and of existing privileges for certain groups according to class, race, or sex. . . . These theories provided an important basis for the enactment of sterilization laws and restrictive immigration laws by the United States between 1910 and 1930 and also for the eugenics policies which led to the establishment of gas chambers in Nazi Germany.⁶⁵

Of course, *Sociobiology* did not include the suggestion that anyone be sterilized or that genocide be committed; instead, scientists like Gould and Lewontin argued that this sort of thinking was uncomfortably deterministic and that “its adherents claim . . . that the details of present and past social arrangements are the inevitable manifestations of the specific action of genes.”⁶⁶

The fact that we might feel a bit unnerved to know so much about ourselves, however, is not the same as arguing that what we now know is wrong. To take two examples:

Gay men are likely to have a smaller third interstitial nucleus in the anterior hypothalamus, a nucleus known to have a role in sex differences. And convicted murderers and other violent, antisocial people are likely to have a smaller and less active prefrontal cortex, the part of the brain that governs decision making and inhibits impulses.⁶⁷

Knowing these things does not mean that we should murder gay men or lock up everyone with a smaller prefrontal cortex; in fact, thinking carefully about them might encourage us to stop thinking of homosexuals as having made a bad lifestyle choice and to seek new ways of understanding violence (and the violent) in our society. Indeed, I think Pinker is most persuasive on this score, arguing that “The megalomania of the genes does not mean that benevolence and cooperation cannot evolve, any more than the law of gravity proves that flight cannot evolve. It means only that benevolence, like flight, is a special state of affairs in need of an explanation, not something that just happens.”⁶⁸ Charges of determinism and racism aside, the evidence against the existence of a ghost in the machine seems clear. And with the ghost gone, it becomes increasingly difficult to argue that autonomous agency accounts for the difference between persons and non-persons.

That said, there are many who will argue that the differences between the PVS patient, the fetus, and myself are minimal in comparison to the relevant similarities, or that making distinctions of the kind I want to make will lead inexorably down a slippery slope that ignores “the moral and spiritual worth of individuals within the human species.”⁶⁹ By and large, those who oppose my proposed distinction do so on the grounds

that all human life is sacred and that assigning more or less value to some life will yield public policy outcomes that generally disrespect human life. In response to the Schiavo case, for example, George W. Bush labeled himself an adherent of this more respectful position, saying “we should be on the side of defending life at all stages, and that includes people that are incapacitated or people with disabilities.”⁷⁰ Perhaps one of the clearest and most thoughtful representatives of this viewpoint within the academy is Timothy P. Jackson.

According to Jackson, the problem with creating a distinction between human animals and human persons is that the dichotomy is a false one. Following the Judeo-Christian tradition, he argues that all human life is sacred and that elevating personhood ignores what is most important about humans. Indeed, it is simply a mistake to sort out, as I have here, when some humans start or stop using language or making autonomous choices because doing so ignores the sanctity of all human life. As Jackson points out, “Sanctity, what the Christian tradition calls ‘being made in the Image of God,’ is most fundamentally the ability to give or receive loving care (*agape*). As such, sanctity is both pre- and post-personal, something coextensive with humanity itself.”⁷¹ On this reading, human lives are honored or valued for a far more basic reason, one that has much less to do with any human capabilities and much more to do with an external source of value. Rather than focusing on achieving personhood, Jackson argues that humans need not do anything or reach any particular platform – like language usage or autonomy – in order to warrant a high standard of respect. Because “sanctity is closely allied with agapic love, construed as willing the good for someone independently of merit,” it inheres in every human irrespective of traditional benchmarks of personhood.⁷² The reason for this is that humanity is defined by needs, most importantly the need for loving care. The ultimate consequence of this way of thinking about humanity, of course, is that there is nothing particularly special about personhood. And Jackson says as much:

Personhood does not spontaneously generate . . . nor, by Christian lights, is individual personhood an end in itself (certainly not the highest). The rational agency associated with autonomous persons is to be used for the sake of ends outside of and larger than the self.⁷³

Instead of focusing on the individual freedom that arises from rationality or autonomy, the hallmark of liberal democracy since its inception, this sort of argument centers around the basic neediness of all humans, those who we see as agents and those who we do not. For Jackson, “Even rational individuals making autonomous choices are not without profound dependencies on one another and on God.”⁷⁴ We need one another – and God, on this reading – to successfully make our way in this world and this is the central feature of who *we* are.

The trouble for Jackson, on my reading, is two-fold. First, I am not convinced that he has done enough work to demonstrate that our need for loving care – and our ability to benefit from it – is what defines us. Second, I remain unconvinced that human animals – fetuses and PVS patients – are the beneficiaries of loving care in the way that Jackson suggests. He argues:

Because it makes sense to talk of non-voluntary development and noncognitive well-being, fetuses, babes in arms, the frail elderly, as well as the permanently demented may all be said to benefit from loving care. Although they are not “rational persons,” ... these human beings have needs and capabilities that can be addressed constructively by others and/or by God.⁷⁵

Clearly, it seems impossible to comment on whether their needs and capabilities can be or are being addressed by God. But in what sense do human animals benefit from our care? The only possible answer is the one that Jackson mentions. They are capable of noncognitive well-being, which might mean, for example, that their bodies benefit from the nourishment we provide, even though – since they are no longer persons – they have no understanding or recognition that they are benefiting. Insofar as the body remains alive, however, Jackson might argue that “They can be served as fellow creatures, and this service redounds to both their and others’ good.”⁷⁶ My argument is that to benefit from loving care, to have needs and capabilities, is to be a human person; it is, in short, to recognize one’s own needs and to understand that one is the recipient of loving care. Put another way, only persons are properly capable of benefiting from loving care – though all beings can obviously be cared for – because non-persons lack an understanding of their needs, which attend brain function. Plants, for example, need water and we care for them by watering them; it is a mistake, however, to suggest that a plant suffers without water in the same way that a person suffers without water. While the plant will likely die if we fail to water it, there is no awareness of death for the plant. The biggest difficulty with substituting the PVS patient for the plant in this example is that the PVS patient *was once* a person. As Kalkut and Dubler correctly state, “For a family who has lost a loved one, often from an acute illness or terrible accident, it is unspeakably difficult to accept that this warm body with a heartbeat is lifeless.”⁷⁷ It remains for me to address the complications implied by this quotation, namely how the PVS patient can be both clearly alive – as mentioned above – but also lifeless. The answer, I argue, can be found in considering the definitions of life and death; looking at these definitions will yield the distinctive feature that makes only some of us persons: dignity.

Dignity and “the boundaries of our existence”

As anyone who keeps abreast of the news knows, there is an on-going and impassioned debate about euthanasia, physician-assisted suicide, and the end of life. While it is markedly less heated than the debate about abortion and the beginning of life, the two are directly related and considering one sheds a great deal of light on the other. In order to reach some sort of conclusion, we need to know at what point someone dies. Two schools of thought exist when it comes to this question: one that argues that living is properly associated with whole-brain activity and one that affords pride of place to higher-brain function. The former, to which Olson belongs, suggests that we are human animals and our continued existence is quite clear: so long as we are breathing and our heart is pumping, we are living. These functions are regulated by the brainstem, rather than the cerebrum, and so the PVS patient – whose cerebrum is fundamentally injured – remains alive. I agree with this assessment; the patient is still clearly alive, if we define life in the way that whole-brain adherents do. The trouble, though, is that the person who went into the hospital is no longer in existence. And that is why death seems to actually occur with higher-brain death: “The patient whose upper brain is lost has, after all, a life just as low in quality as that of the patient whose whole brain is gone.”⁷⁸ All the things that made Terri Schiavo, for example, the person she was have left the body of the PVS patient that was Terri Schiavo. These things are far more integral to our conception of personhood – and of life itself – than the mere animal functioning of brainstem, heart, and lungs (all of which can be duplicated by machine).⁷⁹ What cannot be duplicated or replaced, however, is the sense of self, the “I” that I want to argue makes us persons and from which human dignity is derived.

The “I” is, in my estimation, the most important factor in determining personhood because it is at the heart of identity; without a sense of self, we would be incapable of using language self-reflexively, of thinking of ourselves as autonomous, or of having basic needs. As Jackson notes, “*The Oxford English Dictionary* observes [that] combining ‘self-’ with another word often means ‘expressing reflexive action, automatic or independent action.’ The self both thinks and acts, both in relations to others and reflexively.”⁸⁰ In positing such a self – and arguing for its central role in personhood – haven’t I simply aligned myself with the psychological approach to identity that I dismissed earlier as incorrect? My sense is that I have not. My solution to the problem of personal identity is a biological one, rather than a psychological one, because my argument is that the self arises from the way the brain works; it is a higher brain function, rather than a psychological feature of the way the mind works. But how do we derive dignity from a sense of self?

I do not want to suggest that we achieve dignity through rational thought or action, i.e., that we earn our dignity in the way that Kant

suggests; instead, my argument is that dignity arises from a different sort of higher-brain function. In particular, dignity is a function of our self-consciousness, our ability to talk and think about ourselves. As noted in the previous chapter, the Greek δόξα, from which dignity is derived, is defined as “the opinion which others have of one, estimation, repute.”⁸¹ While this ancient concept was thought to rely on the way we were perceived by others, I want to argue that of far greater importance is the opinion we have of ourselves and, in particular, the stories we tell about ourselves. My dignity is bound up with my answer to the most fundamental identity question, “Who am I? [which] will normally address what is most salient in one’s sense of self.”⁸² This narrative identity, DeGrazia notes, “involves our self-conceptions, our sense of what is most important to who we are.”⁸³ Bound up with my narrative identity is the sense that I can make something of myself; this ability to posit a future that I have a hand in shaping can be traced back at least as far as Nietzsche and has been updated by contemporary theorists like Ronald Dworkin – discussed in the previous chapter – and Richard Rorty, the subject of the next chapter. DeGrazia puts this especially cogently: “Much of what matters (to most of us, anyway) is our continuing existence *as persons* – beings with the capacity for complex forms of consciousness – with unfolding self-narratives and, if possible, success in self-creation.”⁸⁴

On this understanding, it is clear that the PVS patient is not Terri Schiavo, though the two are the same biological animal. The person who was Terri Schiavo, so this argument goes, died when her cerebral cortex, the self-creating part of her brain, stopped functioning. Peter Singer explains:

we can tell in which sections of the brain that blood is still flowing, and in which it is not flowing. If blood is not flowing to the cortex, then – even though the brain stem might still be functioning and so the patient would not be brain dead – the patient would be ‘cortically dead’ and would never recover consciousness.⁸⁵

The huge row that surrounded Michael Schiavo’s decision to remove the life-sustaining feeding tube from the PVS patient was, then, misguided on this reading because Terri Schiavo was no longer alive and, absent personhood, the PVS patient has no interests and is not the bearer of dignity. Of course, the uproar makes a great deal of sense under the assumption that – regardless of consciousness – the PVS patient is still a human animal and, consequently, is worthy of respect and care. Similarly, it makes a great deal of sense if one argues that the PVS patient is a beloved child of God and, therefore, is sacred. These positions are coherent ones, but they are very different from arguing – as many did – that *Terri* was alive and had rights.⁸⁶

On the opposite end of the spectrum, the fetus we have been discussing throughout this chapter presents another puzzle to be solved. At what

point, one might justifiably wonder, does a fetus gain a right to life: conception, viability, birth, or some other time? Famously, Peter Singer has argued “that since no fetus is a person no fetus has the same claim to life as a person.”⁸⁷ On this point, he and I are in agreement: fetuses are not self-conscious, cannot engage in self-creation, and are not bearers of dignity. But Singer goes much further:

Now it must be admitted that these arguments apply to the newborn baby as much as to the fetus. A week-old baby is not a rational and self-conscious being, and there are many nonhuman animals whose rationality, self-consciousness, awareness, capacity to feel, and so on, exceed that of a human baby a week or a month old. If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either.⁸⁸

The reason, on my reading, that Singer goes too far with his suggestion about the permissibility of infanticide is that he puts too much weight on the psychological aspect of the human mind and not enough on the biological. It might well be the case, as argued above, that we who are persons do not have strong psychological connections to the infants we were, but – as yet – we aren’t certain. We know, however, that healthy infants’ brains display organized cortical brain activity (OCBA) and we can measure both the beginning and ending of this “electrical activity in the cerebral cortex of the sort that produces recognizable EEG readings.”⁸⁹ Given that, David Boonin’s argument for using OCBA as the standard by which to judge whether a fetus is a person makes a good deal of sense. If OCBA is not present, we would be hard pressed to make a case for the self-creative feature of the human mind. For the cerebral cortex must be working in an organized manner before anyone can claim that the brain has created the sense of self that is the key feature of personhood.

If we are drawing lines – and with questions of birth and death it often appears that we must – then the line should be drawn at the earliest stage possible as a precaution. With regard to self-consciousness and dignity, it seems to me that Boonin’s line allows much less room for error than Singer’s. Although it might very well be the case that selfhood (as we understand it) begins in infancy – and with it, dignity and personhood – Boonin suggests that we draw the line at the twenty-fifth week of pregnancy; the reason is that there is “ample evidence to suggest that [OCBA begins] to occur sometime between the 25th and 32nd week.”⁹⁰ We might push the line back a bit, however, and adopt an even more conservative estimate about OCBA by drawing the line at twenty weeks; as Boonin concedes:

Burgess and Tawia identify 20 weeks of gestation as “the most conservative location we could plausibly advocate” as the beginning of

what they call “cortical birth,” because it is at this point that “the first ‘puddle’ of cortical electrical activity” of an “extremely rudimentary nature” begins to appear in brief spurts.⁹¹

Adopting this position – rather than Singer’s – would be to argue for a fetal right to life at the twentieth week of pregnancy (the earliest time at which it is possible for OCBA to occur) and, of course, to prohibit things like infanticide. This is, of course, a somewhat radical position, as it suggests that the ruling in *Roe v. Wade* – already controversial enough – needs to be reconsidered in favor of limiting some abortions. While many would argue that redrawing this line is wildly problematic, those who would most feel the effect of doing so are those who suggest that fetuses are persons with rights from the moment of conception, for Boonin notes that “even if we push back the gray area from 25 weeks to 20 weeks, it will still turn out that 99 percent of abortions take place before the fetus acquires a right to life.”⁹² In the end, tying the permissibility of abortion to the absence of organized cortical brain activity seems to have a limited effect on public policy and squares a difficult issue with the non-religious understanding of personhood I have been advancing.

Of course, none of this should be read as suggesting that there is some “I” inside my head, for that would be to fall back onto the untenable position, discussed earlier, of the ghost in the machine. It is often difficult to talk about the “I” without sounding like I am referring to the self that is hard at work inside me, but this is not what I have in mind when I refer to self-consciousness as the source of human dignity. As Pinker suggests:

Cognitive neuroscientists have not only exorcised the ghost [in the machine] but have shown that the brain does not even have a part that does exactly what the ghost is supposed to do: review all the facts and make a decision for the rest of the brain to carry out. Each of us feels that there is a single “I” in control. But that is an illusion that the brain works hard to produce. . . . The brain does have supervisory systems in the prefrontal lobes and anterior cingulate cortex, which can push the buttons of behavior and override habits and urges. But those systems are gadgets with specific quirks and limitations; they are not implementations of the rational free agent traditionally identified with the soul or the self.⁹³

I want to argue, with Pinker, that the existence of the “I” is an evolutionary strategy developed by my genes to make my brain a better, more clever one. But knowing that there is no “I” in the center of my brain, pulling levers and adjusting dials, does not alter or invalidate my feeling of selfhood. And, as I have argued, it is this feeling that accounts for my having dignity and being a person. It is, in my estimation, the feature that separates human persons from human animals and, so far as we know, from all other animals.

5 Does might make human rights?

Sympathy, solidarity, and subjectivity in Richard Rorty's final vocabulary

The question of whether there is some feature or quality inherent in human beings from which our rights spring is central to any attempt at understanding human rights claims. As Michael Perry notes:

The fundamental challenge to each and every human rights claim – in particular, to each and every claim about what ought not to be done to any human being or what ought to be done for every human being – is a demand for reasons.¹

For Richard Rorty, however, this demand for reasons is symptomatic of a deep desire, one that is at the heart of the Enlightenment project and can be traced back as far as the earliest priests and philosophers:

They were going to explain to us the ultimate locus of power, the nature of reality, the conditions of the possibility of experience. They would thereby inform us what we really are, what we are compelled to be by powers not ourselves. They would exhibit the stamp which had been impressed on *all* of us. This impress would not be blind, because it would not be a matter of chance, a mere contingency. It would be necessary, essential, telic, constitutive of what it is to be a human.²

Today, Rorty argues, this desire is an outmoded – but firmly entrenched – one;³ despite Nietzsche's suggestion that we give up "the idea of finding a single context for all human lives,"⁴ most people are not anxious to abandon the possibility of an objective truth and many philosophers are nervous about what might result should they do so.⁵ That said, Rorty believes that because such a foundation does not necessarily exist, philosophy ought not be tasked with its discovery.

Despite these assertions, however, he also notes that in "abandoning the traditional notion of truth, Nietzsche does not abandon the idea of discovering the causes of our being what we are."⁶ Rather than "coming to know a truth which was out there (or in here) all the time," Nietzsche "saw self-knowledge as self-creation" and suggests that "coming to know oneself,

confronting one's contingency, tracking one's causes home, is identical with the process of inventing a new language – that is, of thinking up some new metaphors.”⁷ Indeed, Rorty argues that Nietzsche bases his philosophy on the idea that certain people, those who embrace “mere contingent circumstance”⁸ and exert their will nonetheless, could create their own truths about the world they inhabit:

He hoped that once we realized that Plato's ‘true world’ was just a fable, we would seek consolation, at the moment of death, not in having transcended the animal condition but in being that peculiar sort of dying animal who, by describing himself in his own terms, had created himself.⁹

Rorty argues that, like Nietzsche, Sigmund Freud believes that there are far more important tasks for individuals to undertake than a search for a single truth. For Freud, the objective is “to sketch a narrative of our development, our idiosyncratic moral struggle, which is far more finely textured, far more custom-tailored to our individual case, than the moral vocabulary which the philosophical tradition offered us.”¹⁰ In the end, Rorty argues, “He leaves us with a self which is a tissue of contingencies rather than an at least potentially well-ordered system of faculties.”¹¹

Like both Nietzsche and Freud, Rorty attempts to enter into an existing debate on his own terms; rather than arguing with Plato and Locke about metaphysics, Rorty insists that the entire discipline is now outdated. For Rorty, “the vocabulary of Enlightenment rationalism, although it was essential to the beginnings of liberal democracy, has become an impediment to the preservation and progress of democratic societies.”¹² While this claim is an engaging one, it is also troubling for a great many human rights theorists. Perry, for example, argues that the only intelligible understanding of the idea of human rights is a religious one and that the Nietzschean undermining of religion has serious repercussions for any defense of human rights. He takes clear aim at the nonchalance with which Rorty “has recommended that we simply stop trying to defend the idea of ‘human rights.’”¹³ Doing as Rorty recommends, Perry (and others) argue, could open the door to any number of illiberal possibilities. That said, it might instead suggest a plausible non-religious grounding for the idea of human rights of the sort that Perry denies.¹⁴ With these stakes in mind, the first section of this chapter will take a detailed look at the Rortyan ideal of liberal irony and the question of whether this sort of irony is a desirable, or even psychologically possible, character trait. The second section brings the disagreement between Rorty and those he refers to as metaphysicians into sharper focus by examining the figure of the illiberal ironist, who is armed with the same tools as his liberal counterpart but reaches the opposite conclusion about human suffering. Finally, the chapter considers the

place of sympathy and solidarity in what I take to be Rorty's answer to his detractors. I ultimately argue that Rorty has been unsuccessful in abandoning metaphysical claims, as he relies on the foundational idea that sympathy and solidarity are natural and universal characteristics of humanity; in doing so, however, Rorty has succeeded in providing an answer to Perry's assertion that "the idea of human rights is . . . ineliminably religious"¹⁵ by suggesting a plausible non-religious foundation.¹⁶

The trouble with irony

Despite his disdain for metaphysics and his embracing of contingency, Rorty should not be thought of as a complete relativist. In fact, he has a very clear formulation of the goods that liberal societies should secure for their citizens; perhaps the two most important items on this list are a guarantee of private self-creation and a general lessening of cruelty. But why should a society of people engage themselves in private self-creation and a public campaign against cruelty, particularly if there can be no recourse to metaphysical concepts like human nature or the common good? Herein lies the problem with philosophers of the Nietzschean tradition: "This is the view that liberal institutions and culture either should not or cannot survive the collapse of the philosophical justification that the Enlightenment provided for them."¹⁷ Steven Kautz, for example, is appalled "that 'there is no *neutral*, noncircular way to defend' liberal ways . . . against 'Nazi and Marxist enemies of liberalism'"¹⁸ in Rorty's system. For Rorty, however, the only possible defense of liberalism – and indeed of anything at all – is a revolving, contestable one. Even Rorty's own assertions about the contingency of language, selfhood, and community, he maintains, are circular; this inability to offer irrefutable proof for his own position is nicely internally consistent. For Kautz, the main problem is that it seems impossible for "this new species of liberalism . . . [to] sustain the practice of the humane liberal virtues."¹⁹ As Perry noted earlier, the Nietzschean assertion "thus I willed it,"²⁰ so dear to Rorty's process of individual self-creation, leaves open an avenue for "a nasty, illiberal rebellion . . . against gentle liberal virtues."²¹

Indeed, for Perry and Kautz, this is the most dangerous aspect of Rorty's theory and also the most difficult to understand. It is dangerous for two reasons; first, it leaves us without a reason for sustaining our own beliefs about the virtues of the contemporary human rights regime. The question becomes:

why shouldn't those of us who have acquired a fondness for human rights try to disabuse ourselves of that fondness . . . at least, why shouldn't we try to moderate that fondness – once it becomes clear that indulging a fondness for human rights can be, politically, economically, militarily, and so forth, a rather costly proposition?²²

Second – as Kautz notes – it provides no defense against those who do not hold the same beliefs we do about the value of human life. Perry wonders, for example, whether it is

really enough, when confronted by intellectual or, worse, existential repudiations of human rights, to retreat, *pace* Rorty, into a kind of ethnocentrism – at one point Rorty refers to “our Eurocentric human rights culture” – proclaiming proudly and loudly that although among us late-twentieth-century North Americans and Western Europeans (and perhaps a few others), a great fondness for human rights, or for “the moral point of view”, is nothing more [than] a culturally acquired taste, it is *our* acquired taste and we are willing, if necessary, to fight and even die for it?²³

It is not entirely clear how Rorty would respond to this question but there is certainly something very troubling, however, about saying – with Rorty:

that when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form “There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you.”²⁴

This point may emphasize Rorty’s greatest weakness: there is little (or nothing) a liberal ironist can do to contest the type of self-creation that leads some people to a life of extreme cruelty.²⁵ As Perry notes:

if the fondness for human rights some of us have is, at bottom, nothing more than an acquired taste, what is there to say to those who have not acquired the taste – and who might even have acquired a taste for violating (what we call) human rights – other than, perhaps, “Try it, you’ll like it (maybe)”?²⁶

While this ironist can certainly assert in a liberal society, as Rorty does, that “cruelty is the worst thing we do,”²⁷ she has no recourse to stop any potential offender that is an “other” and, consequently, outside of that liberal society.²⁸ It would seem that only when the people in that “other” society deems cruelty to be the worst thing *they* do as well can Rorty’s liberal ironist take action to stop offenses. But what of those proponents of liberalism who live within an “other” society and risk extrajudicial execution, torture, or disappearance at the hands of their fellows (and their government) who disagree about cruelty being the worst thing they do? In these “other” societies around the world, the waiting game played by targeted groups (that of anticipating a time when Western liberals will provide assistance to their cause) seems both interminable and deadly serious.

On the surface, then, Rorty's theory does not seem to be very exportable. Rather, he seems content to work at resolving inequalities within American liberalism while quietly ignoring the various atrocities that occur with frighteningly high frequency elsewhere. I do not think that this is the extent of Rorty's answer, however. His response, bound up with the notion of solidarity, will be considered in greater detail below. To arrive at that argument, we must begin by recognizing the importance, for Rorty, not only of the fact that "contemporary liberal society already contains the institutions for its own improvement,"²⁹ but also that "more and more people . . . are able to recognize the contingency of the vocabulary in which they state their highest hopes – the contingency of their own consciences – and yet have remained faithful to these consciences."³⁰ Traditional liberals generally balk at the Rortyan notion that:

what justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, *given our history and the traditions embedded in our public life*, it is the most reasonable doctrine *for us*.³¹

This position, according to Kautz, leaves liberals with no good reason why people should make "reason, not force, their rule of right,"³² since it is necessary under Rorty's version of liberalism to "repudiate any appeal to our common human natures, rather than providing a response or to our 'essential humanity,' as a ground of principles of right conduct."³³ Rorty requires individuals to think about whether there exists, for them, a "social good more important than avoiding cruelty," but this begs the question rather than providing a response as to why a society should refrain from using force or being cruel.³⁴ Indeed, Rorty does not seem to have an adequate response to Kautz on this point.³⁵ He avoids entirely the language that I have employed here, choosing to take "should" and "ought" out of the pragmatist's vocabulary entirely. Despite removing these two words, however, Rorty's plan for an ironist liberal society is filled with what sound like thinly-veiled moral imperatives. In other words, we might substitute every "is" for an "ought" without doing violence to the position that Rorty advocates. With this in mind, I believe that Rorty provides an answer to Kautz; he wants to prohibit liberals from using force in order to avoid a particular form of cruelty, one that infringes on individual self-creation. And his argument is that liberals ought to refrain from being cruel because that, ultimately, is what stands at the core of liberalism.

Indeed, Rorty asserts that "The social glue holding together the ideal liberal society . . . consists in little more than a consensus that the point of social organization is to let everybody have a chance at self-creation to the best of his or her abilities."³⁶ As I have previously noted, Rorty is unwilling

to base this type of assertion on the foundation of “a view about universally shared human ends, human rights, the nature of rationality, the Good for Man, nor anything else.”³⁷ Instead, Rorty’s distinctly Western (indeed, American) response to Kautz’s argument for the necessity of classical liberal foundations is simply that:

without the protection of something like the institutions of bourgeois liberal society, people will be less able to work out their private salvations, create their private self-images, reweave their webs of belief and desire in the light of whatever new people and books they happen to encounter.³⁸

The liberal ironist, however, should not be deterred by the obvious frustration of having to work within a Rortyan, and thus anti-foundationalist, system to achieve her ends.³⁹ For Rorty, there is simply no need for the universalistic principles put forward by Plato or Kant, and reiterated by Perry and Kautz; it is adequate to use our common history as proof of the practical advantage of individual self-creation and “bourgeois” freedoms rather than demand that all people are born with this type of entitlement.⁴⁰

This important point is not presented as being free of controversy; as usual, Rorty attempts to anticipate the arguments of his detractors. The task at hand is to persuade those who question him that Western liberal human rights are no less defensible simply because they are useful and because they are ours than they would be if it could be determined that they were aligned with “*how the world really is*.”⁴¹ I submit that he is less successful in this than he is in providing a useful framework from which we can construct a non-religious defense of these same rights. For Rorty, there are two main objections to his idea of the “social glue” that holds together the ideal liberal society: first, “that the . . . metaphysical rhetoric of public life in the democracies is essential to the continuation of free institutions,” and second “that it is psychologically impossible to be a liberal ironist – to be someone for whom ‘cruelty is the worst thing we do,’ and to have no metaphysical beliefs about what all human beings have in common.”⁴²

To dispel the suggestion that our society will most likely collapse with the emergence of liberal irony, “the general adoption of antimetaphysical, antiessentialist views about the nature of morality and rationality and human beings,”⁴³ Rorty looks to the decline of religious faith amongst liberals. Interestingly, contra Nietzsche, a weakening of the belief in an afterlife has not contributed to the destruction of moral fiber, “social glue,” or the liberal societies that thought themselves hinged on the concept of future rewards.⁴⁴ Indeed, liberalism seems to have benefited from this change, as an individual postmortem good has transferred easily to a social one:

whereas belief in an immortal soul kept being buffeted by scientific discoveries and by philosophers’ attempts to keep pace with natural

science, it is not clear that any shift in scientific or philosophical opinion could hurt the sort of social hope . . . that life will eventually be freer, less cruel, more leisured, richer in goods and experiences, not just for our descendants but for everybody's descendants.⁴⁵

This defense is a plausible one and offers nothing surprising to those who have begun to accept the Rortyan ideas of contingency and irony.⁴⁶ The interesting twist here, however, is Rorty's final assertion that irony is a necessarily private activity:

I cannot go on to claim that there could or ought to be a culture whose public rhetoric is *ironist*. I cannot imagine a culture which socialized its youth in such a way as to make them continually dubious about their own process of socialization.⁴⁷

The entire concept of irony necessitates a contrast between public and private.

The manner in which Rorty deals with the first objection to his "social glue" formulation, then, necessitates a convincing answer to the second objection, the "suggestion that the public-private split I am advocating will not work: that no one can divide herself up into a private self-creator and public liberal, that the same person cannot be, in alternate moments, Nietzsche and J.S. Mill."⁴⁸ Clearly, the claim of a tension, potentially unresolvable, between liberalism and ironism is a very serious one and it seems to me that Rorty does not provide the answer we need. Recall that liberals, in Rorty's formulation, are "the people who think that cruelty is the worst thing we do"⁴⁹ and that ironism "results from awareness of the power of redescription."⁵⁰ One cannot, on this reading, be a good liberal and a good ironist all at once. For to be an ironist is to consistently engage in redescriptive projects. But, as "Redescription often humiliates,"⁵¹ good liberals ought not practice such redescription publicly. Indeed, we should be skeptical, at least to some degree, when it comes to those with a penchant for redescription and deconstruction.

Cleverly, Rorty puts forward the possibility that humiliation is not necessarily tied to ironism, despite the potential that exists for humiliation when a final vocabulary is threatened. Indeed, Rorty claims that irony is no more inclined to humiliate than is metaphysics: "The metaphysician also redescribes, even though he does it in the name of reason rather than in the name of the imagination."⁵² The difference between the two, however, is that metaphysics gives the impression of empowerment through redescription by offering to show the objective truth to those whose final vocabularies did not previously include it. The ironist, rather than humiliating others through the process of redescription, is simply unable to "offer the same sort of social hope as metaphysicians offer."⁵³ I remarked that Rorty is clever in this maneuver; indeed, he momentarily

diverts our attention from the original problem: some people may not wish to have their final vocabularies redescribed and it is, therefore, cruel to do so. One cannot be a good liberal and a good ironist all at once. This scenario, then, offers to us a reason for the importance of a split between public and private. The ironist may describe anyone or anything in whatever way she sees fit *privately*, but must – as she is also a liberal – “become aware of all the various ways in which other human beings whom I might act upon can be humiliated.”⁵⁴ Rorty does a nice job of pointing out the distinction here. Public life need not be distinguished from private life for the metaphysician because he is convinced that he knows, and can share, the truth “about how things really are.”⁵⁵ For the ironist, who does not have access to the concept of objective truth, public life is characterized by “a certain kind of know-how,”⁵⁶ which necessitates learning all she can about what humiliates other people and avoiding these particular actions or redescrptions in public.⁵⁷

While this is a fine, eloquently explained position, I would be remiss if I did not point out that Rorty’s reformulation of the second opposition to his concept of “social glue” allows him to duck that opposition entirely. He has not actually defended the notion that ironism and liberalism can co-exist thanks to a split between the public and private realms, but rather that such a split is absolutely necessary *if* the two were ever to co-exist. Indeed, two chapters of *Contingency, Irony, and Solidarity* are devoted to detailing two famous literary creations who embody irony but not liberalism: Nabokov’s Humbert Humbert and Orwell’s O’Brien.⁵⁸ But Rorty is not without an answer – both to the original opposition and also to his reason for including literary examples of famous illiberal ironists. After leveling the playing field by sketching the possibility that metaphysicians could easily face the same charge of humiliation that ironists currently face, Rorty returns to the definition of liberals as “the people who think that cruelty is the worst thing we do.”⁵⁹ If liberalism can indeed be boiled down to this statement,⁶⁰ it seems obvious that liberals would seek to end (or, at the very least, lessen) the cruelty they do. Rorty notes, however, that metaphysicians – particularly those pointing accusatory fingers at liberal ironists who they claim are not doing enough – are concerned only with “answering questions like ‘Why not be cruel?’ or ‘Why be kind?’”⁶¹ Liberal ironists, who face charges of anti-liberal sentiment because of their refusal to answer these questions, are actually better liberals than their accusers. As Rorty explains:

For public purposes, it does not matter if everybody’s final vocabulary is different, as long as there is enough overlap so that everybody has some words with which to express the desirability of entering into other people’s fantasies as well as into one’s own. But those overlapping words – words like “kindness” or “decency” or “dignity” – do not form a vocabulary which all human beings can reach by reflection

on their natures. Such reflection will not produce anything except a heightened awareness of the possibility of suffering. It will not produce a *reason to care* about suffering. What matters for the liberal ironist is not finding such a reason but making sure that she *notices* suffering when it occurs.⁶²

These distinctions between ironists and metaphysicians help to explain why irony should not be called on to further the causes of freedom, equality, or justice. The failure of ironist philosophy to do so, as noted earlier, is a direct result of the expectations, grounded in a metaphysical upbringing, that liberals have of philosophy in general: “If we could get rid of the expectation, liberals would not ask ironist philosophy to do a job which it cannot do, and which it defines itself as unable to do.”⁶³ Rorty’s answer, then, is a fairly straightforward one:

I conclude that what the ironist is being blamed for is not an inclination to humiliate but an inability to empower. There is no reason the ironist cannot be a liberal, but she cannot be a “progressive” and “dynamic” liberal in the sense in which liberal metaphysicians sometimes claim to be.⁶⁴

Self-creation and humiliation

While Rorty makes an interesting point with regard to the expectations placed on ironist philosophy, he has only suggested that nothing *prevents* a liberal from also being an ironist. He does give an example, that of “the typical modern intellectual,”⁶⁵ and he goes on to argue “that ironist philosophers are private philosophers . . . [whose] work is ill-suited to public purposes, of no use to liberals qua liberals.”⁶⁶ Rorty has in mind, here, “the young Hegel, Nietzsche, Heidegger, and Derrida.”⁶⁷ This list is a bit unusual, as this group does not immediately call to mind the idea of liberalism; for Rorty, however, Nietzsche and Heidegger present the most compelling picture of the importance of private philosophy:

They are figures whom the rest of us can use as examples and as material in our own attempts to create a new self by writing a bildungsroman about our old self. But as soon as either tries to put forward a view about modern society, or the destiny of Europe, or contemporary politics, he becomes at best vapid, and at worst sadistic.⁶⁸

With that in mind, Rorty goes on to argue that

We should stop trying to combine self-creation and politics, especially if we are liberals. . . . [L]iberal political discourse would do well to

remain as untheoretical and simpleminded as it looks . . . , no matter how sophisticated the discourse of self-creation becomes.⁶⁹

And this prescription can be seen as a sort of prelude to Rorty's decision to dedicate two chapters of *Contingency, Irony, and Solidarity* to illiberal ironist characters, for in an area where philosophy does little – giving voice to those who suffer – literature is capable of doing a great deal. The liberal ironist, as we noted above, needs to gather as much information as possible about humiliation and other existing final vocabularies in order to avoid causing the former through a public redescription of the latter. Literature is the key that grants access to this information:

Fiction like that of Dickens, Olive Schreiner, or Richard Wright gives us the details about kinds of suffering being endured by people to whom we had previously not attended. Fiction like that of Choderlos de Laclos, Henry James, or Nabokov gives us the details about what sorts of cruelty we ourselves are capable of, and thereby lets us redescribe ourselves.⁷⁰

Is there anything, however, that prevents people from rejecting outright Rorty's claim that "cruelty is the worst thing we do"?⁷¹ Might it not be said, in some societies, that cruelty is actually the *best* thing that people do, that it is the only thing they have in common with one another, or that it is necessary in order to accomplish a desired communal end? Keeping in mind that there is no concept of humanity or universal truth to appeal to, Rorty cannot deny this possibility, nor can he make the claim that all humans qua humans have a certain set of rights which are guaranteed to them. All he can assert is that a small group of people, citizens in liberal societies, have these particular liberties and rights. This, undoubtedly, is the most worrisome aspect of Rorty's theory. It enables foundationalist philosophers to suggest how Rorty might discuss the Holocaust: while it is not something "we" would ever do because of our societal history, perhaps it is something that Germans are inclined to do; we cannot intervene if it were to happen again because it might simply be something useful for them in their society. I do not believe that this would be Rorty's response, if we read him correctly.

Rorty's response to a society that takes cruelty to be its standard relies heavily on the idea of redescription. But would it be possible for a liberal ironist to effectively redescribe Nazism, for example, to persuade practitioners of extreme cruelty and of genocide to embrace liberalism? Or, on the other hand, might a particularly clever, eloquent, imaginative – in short, ironist – Nazi succeed at redescribing liberalism to show that cruelty, as we have already stated, might be the *best* thing for some people to do to others? These questions are taken up by Eric Gander in a particularly interesting response to Rorty's theory. As the illiberal ironist is cer-

tainly the most frightening aspect of Rorty's philosophical system to foundationalist and anti-foundationalist critics alike, Gander focuses on how Rorty would imagine a liberal ironist capable of stopping such a Nazi from constructing a persuasive redescription of liberalism. From the outset, Rorty is engaged in a reformulation of his assignment; rather than 'prove' to the Nazi that being cruel is wrong, he will attempt to change his mind about some of the choices he makes. In Rorty's words:

If I were assigned the task not of refuting or answering but of *converting* a Nazi . . . I could show him how nice things can be in free societies, how horrible things are in the Nazi camps, how the Führer can plausibly be redescribed as an ignorant paranoid rather than as an inspired prophet, how the Treaty of Versailles can be redescribed as a reasonable compromise rather than a vendetta, and so on.⁷²

This reformulation is the basis of one of Gander's two main critiques of Rorty. In his view, "Just as soon as the conversation begins, *Rorty* excludes reason"⁷³ from his discussion with the Nazi.

Reason, Gander insists, is capable of "showing" the Nazi that some of his most important beliefs contradict other important beliefs. This, though, is simply one more example of a metaphysical conviction and Rorty has always maintained that "There is no *neutral*, noncircular way"⁷⁴ for the liberal ironist to demonstrate that one position is right and the other wrong. If he could now 'show' us such a way, he would place himself in a very difficult – even contradictory – position. Instead, Rorty explains that describing various contradictions within Nazism will yield poor results: "attempts at showing the philosophically sophisticated Nazi that he is caught in a logical or pragmatic self-contradiction will simply impel him to construct invidious redescrptions of the presuppositions of the charge of contradiction."⁷⁵ So what is there for a liberal ironist to do? In attempting to proceed through this philosophical mess, Rorty might employ a clever maneuver that has worked for him previously: he can point out, against Gander, that metaphysics is no more useful in this case than is liberal irony. The metaphysical hope at stopping Nazi atrocities would be based on some appeal to reason or our common humanity. If, for example, the Nazis could only be made to see the truth of the human condition, they would cease their brutality.⁷⁶ Unfortunately, those who are intent on committing genocide are not much interested in listening to sermons about why cruelty against other human beings is wrong, and these types of appeal are easily silenced by a single gunshot. Force quickly wins out over persuasion – even when the truth is involved. This might be why Rorty rejects any attempt to use reason against the ironist Nazi. In the end, Gander finds Rorty's response unconvincing because he believes "we must maintain a minimalist foundationalist political rhetoric that centers on reason."⁷⁷ I am also not convinced, but for a very different, distinctly Rortyan, reason.

When Rorty sets out to “convert” the Nazi rather than “refuting” him, we are reminded that much of his writing on liberalism focuses on avoiding cruelty. As I noted earlier, Rorty takes great care to avoid the particular type of cruelty (humiliation) that arises from the redescription of a person’s final vocabulary. Unless the redescription of Nazism is a metaphysical one and results in an empowering conversion, the liberal ironist engaging the Nazi runs the risk of humiliating him. If we recall Rorty’s original answer to this problem – to learn all we can about ways to avoid this type of humiliation – we are faced with the realization that we must avoid any attempt to convert those who would rather not be converted. What Gander notices about this Rortyan conundrum is quite valuable: “the avoidance of humiliation requires more than simple restraint, more than mere tolerance. It requires *active acceptance*, at some level, of another’s final vocabulary.”⁷⁸ While the liberal ironist is not required to reform her own final vocabulary in order to avoid humiliating others, she must understand what humiliates others and avoid those actions. Based on his own argument, then, Rorty ought not attempt to convert the Nazi at all.

There is a tension here which we must try to resolve based on the seeming necessity of finding a way to deal with the problem of Nazism in Rorty’s system. Although it might be important to avoid humiliating the Nazi by redescribing his final vocabulary in order to convert him, we must recall Rorty’s belief that liberals attempt, always, to alleviate suffering. What about the suffering they experience when unable to make public their own final vocabularies in the same way the Nazi can? As Gander notes, “all sorts of groups . . . *do not want to (or feel they cannot) keep their private vocabularies private*. Indeed, quite a few groups would argue that forcing them to keep their private vocabularies private is both humiliating and oppressive.”⁷⁹ We have returned, here, to our earlier discussion about the public/private split necessitated by Rorty’s ideas concerning cruelty and liberalism. In this case of conflicting final vocabularies, Rorty seems to have an answer ready:

A lot of things that some of the powerful believe in their hearts – e.g., that men have the right to beat up on women whenever they need to bolster their own self-confidence – are things they can no longer say in public, and can barely admit to themselves. We have a long way to go in this direction, obviously, but I see no better political rhetoric available than the kind that pretends “we” have a virtue even when we do not have it yet. That sort of pretense and rhetoric is just how new and better “we’s” get constructed. For what people cannot say in public becomes, eventually, what they cannot say even in private, and then, still later, what they cannot even believe in their hearts.⁸⁰

If we continue to highlight the tension between liberalism and Nazism, the objectionable one of the two vocabularies will become outmoded and

unacceptable publicly and, eventually, privately as well. But what about all of the suffering that might have been alleviated by simply killing the Nazi rather than engaging him in conversation? And, if we persist with our attempt at conversion, what guarantee do we have that the vocabulary we oppose will become passé and not our own? Not only are we without such a guarantee, but we can only hope that the powerful decide not to use force to assure the success of their final vocabularies.

Rorty, however, understands this vocabulary manipulation as good (or, at least, decent) advice on the way to maintain a public/private split and also to fend off the claim that a conversation with our ironist Nazi always results in a lose-lose situation for our liberal ironist. I am not convinced, however, that he has established anything other than a situation wherein proponents of liberalism and Nazism butt heads for a while before they simply part ways, each hopeful that the other will give up his policy of conversational engagement. Both parties have, by this time, experienced the humiliation of having their final vocabularies redescribed in the hope that one will eventually become unpopular and outmoded, but neither has achieved this outcome. Liberals have always liked to imagine themselves incapable of waking one morning as good Party members. Rorty would agree; our particular history and system of values enables us to resist a fascistic redescription of society. The same, however, should also be true of the Nazi – he is as well-equipped to resist redescription as we are. The problem with this scenario is that we can imagine the liberal ironist and the ironist Nazi presenting each other with a list of the various reasons the other is insufferable. Neither seems likely to succeed in converting the other, however, and the suffering of Europe's Jews would continue unabated.

This discussion puts a finer point on a problem presented earlier by Perry and Kautz. Gander correctly points out the potentiality of Weimar's citizens also imagining themselves incapable of succumbing to Hitler's redescription. If they fell victim to Nazism, what will prevent us from following suit when we adopt this policy of engagement with the Nazi? In Rorty's system, the liberal ironist is armed with nothing more than the power of her mind and *chance*, as a liberal society can "make life harder for others only by words, and not deeds."⁸¹ As Gander notes, "If we leave it entirely up to redescriptive chance, we have no more reason for believing we will finally end up a liberal society than for believing we will finally end up a Nazi society."⁸² This is as insufficient and desperately frightening of a response for Gander as it was for Kautz and Perry. Because we might be converted by the illiberal ironist's redescription, Gander quickly attempts to convince us that Rorty has – by allowing us to even engage in conversation with the Nazi – taken us to the very brink of the abyss and that the only way to bring us back is by relying on the foundationalist notion of objective truth. Indeed, he goes so far as to suggest that "If Rorty is correct in what he says, then we liberals should act now to eliminate forcefully the possibility that antiliberals could engage in conversation *with us*."⁸³

Further, since Rorty's own conception of liberalism will never allow this type of behavior, Gander concludes that Rorty must, finally, "have *some* faith in Jefferson's claim that 'Truth is...the proper *and sufficient* antagonist to error' and has nothing to fear in a free and open encounter."⁸⁴

Replacing "why" with "how"

I disagree with the avenue by which Gander arrives at his conclusion about Rorty's own version of foundationalism, but I do not dispute that conclusion. Positing that the first answer to the ironist Nazi has not alleviated any suffering whatsoever, I will hypothesize a second way in which Rorty might respond to the Nazi threat. It is, in my opinion, presupposed by Rorty's position throughout *Contingency, Irony, and Solidarity*, and it is explicitly laid out in a more recent article, "Human Rights, Rationality, and Sentimentality." In order to proceed with it, however, we must recognize an important component of Rorty's own final vocabulary, one that has been implicitly understood throughout this chapter: human beings are unique, as compared to other animals, in their ability to engage in self-creation and to experience humiliation.⁸⁵ There is, of course, a distinctly universalistic flavor to this statement, but it seems to me that Rorty must ultimately be willing to reject his anti-universalist stance if he wants to proceed from evolutionary principles, as he frequently suggests he does.⁸⁶ In this case, the conclusion that Rorty has been implicitly suggesting has to do with the way the human mind works and – as the previous chapter highlighted – scientists who study the brain have been arguing for some time that there is a good deal of evidence suggesting the existence of human universals and a human nature. Rather than adopt a speciesist line here, let me add that it is not impossible – though it might be a bit far-fetched at this point in time – to imagine a time when people will also speak of the ability of dolphins or chimps to imagine entirely new descriptions of the world. Until that time, it seems quite plausible to imagine Rorty speaking of a single, indivisible unit of human rights: the mind.⁸⁷

Rorty utilizes the writing of George Orwell to sketch the ability of those in power to violate our two human rights. With regard to our right to be free from humiliation, he notes:

O'Brien [in 1984] reminds us that human beings who have been socialized – socialized in any language, any culture – do share a capacity which other animals lack. They can all be given a special kind of pain: They can all be humiliated by the forcible tearing down of the particular structures of language and belief in which they were socialized (or which they pride themselves on having formed for themselves).⁸⁸

Orwell also provides an example of what happens when our right to self-creation is violated, which highlights its close relationship to humiliation:

Making Winston briefly believe that two plus two equals five serves the same “breaking” function as making him briefly desire that the rats chew through Julia’s face rather than his own. But the latter episode differs from the former in being a final, irreversible unmaking. Winston might be able to include the belief that he had once, under odd conditions, believed that two plus two equals five within a coherent story about his character and his life. Temporary irrationality is something around which one can weave a story. But the belief that he once wanted them to *do it to Julia* is not one he can weave a story around. That was why O’Brien saved the rats for the best part, the part in which Winston had to watch himself go to pieces and simultaneously know that he could never pick up those pieces again.⁸⁹

While we may still be unable, in a Rortyan world, to intervene on behalf of those suffering under Nazi oppression with a sweeping appeal to the objective truth about the sacredness of persons, Rorty ought to suggest that we insist on every human being’s right to self-creation. This statement, however, may seem a lower bar than any appeal to our common humanity embraced by foundationalist philosophers. Kautz points out an interesting problem, here, when he says that “It does no moral good to abolish the floor of our moral world (our ‘humanity’) simply because we fear that some foolish individualists may mistake the floor for the ceiling.”⁹⁰ There *is* something valuable in recognizing our common humanity, but that will only take us so far. As Rorty notes:

To get whites to be nicer to blacks, males to females, Serbs to Muslims, or straights to gays . . . it is of no use whatever to say, with Kant: notice that what you have in common, your humanity, is more important than these trivial differences. For the people we are trying to convince . . . are offended by the suggestion that they treat people whom they do not think of as human as if they were human.⁹¹

Indeed, atrocities are most often committed by those who “take themselves to be acting in the interests of true humanity by purifying the world of pseudo-humanity.”⁹² William F. Schulz expresses this nicely: “In Shakespeare’s *The Merchant of Venice*, Shylock cries out, ‘I am a Jew, Hath not a Jew eyes?’ . . . What do we say to the killer who responds to Shylock, ‘Yes, a Jew has eyes but so does a pig?’”⁹³

With that in mind, Rorty’s bar might actually be a bit higher than the traditional one, for he insists that each individual mind must be free to construct the story of itself. By recognizing even “the private poem of the pervert, the sadist, or the lunatic,”⁹⁴ we ensure that no one can make a claim against the self-creative ability of even those who seem the most unworthy citizens. The position that Rorty adopts is this: we can make an argument for human rights by raising the bar from our common humanity

– the existence of which we should be skeptical of – to the power of the individual mind which, if we recognize all minds regardless of the type of self-creation they embark on, is indisputable.⁹⁵ With this, Rorty has, perhaps unwittingly, stepped into the same trap that snared Nietzsche. Ironically, Rorty himself calls our attention to

that side of Nietzsche which Heidegger rightly condemned as one more example of inverted Platonism – the romantic attempt to exalt the flesh over the spirit, the heart over the head, a mythical faculty called “will” over an equally mythical one called “reason.”⁹⁶

It is impossible not to notice that the power of the mind (both its self-creative ability and susceptibility to humiliation) is a foundation like any other Rorty consistently criticizes. We should, if Rorty is to be consistently applied, be as skeptical of his claim as we are of any other.

It seems to me, though, that this particular foundation ought to be embraced even (or especially) by Rortyans because it tells us a great deal about ourselves without also necessitating a belief in some transcendent or teleological worldview. The similarities of humanity, far more numerous than our surface differences, are – on this reading – the result of the blind evolutionary process alone. Such a foundation offers us a non-religious story we can tell about ourselves that includes the universal complex brain that Rorty implicitly endorses – even though he tries, strangely, to reject the human nature built upon that brain.⁹⁷ Eventually, though, it seems necessary that Rorty fully come to terms with the position he is advocating. Rorty, of course, refuses to admit that he – like Perry, Kautz, and Gander – is some kind of foundationalist. And worse still, his thoughts on how to deal with cruelty and suffering haven’t, to this point, met his own test of making a practical difference. After all, if liberal ironists believe that “cruelty is the worst thing we do”⁹⁸ and have the “desire to prevent, the actual and possible humiliation of others,”⁹⁹ their goal must be to minimize cruelty and suffering.¹⁰⁰ Despite being “able to recognize the contingency of the vocabulary in which they state their highest hopes,”¹⁰¹ ironist liberals must also remain faithful to that vocabulary or face humiliation. The same is true of the ironist Nazi; he must always refuse our liberal redescrptions of his world. After all, a successful, ironist conversion of “a sophisticated, consistent, passionate, psychopath – for example, a Nazi who would favor his own elimination if he himself turned out to be a Jew,”¹⁰² would necessarily result in the humiliation of that Nazi. Following such a thoroughly wrenching, torturous conversion, he could only say to himself – like 1984’s Winston Smith – of Nazism: “Now that I have believed or desired *this*, I can never be what I hoped to be, what I thought I was.”¹⁰³ But Rorty insists that liberals must only persuade or convert – they ought not to force – those who hold illiberal beliefs to give up their cruelty.¹⁰⁴ If the ironist Nazi refuses to accept the various redescrptions we

put forward in favor of minimizing cruelty, as it seems likely he will, what other options do we have? Rorty seems to have bound our hands: there are times when we must either act cruelly ourselves by humiliating others or sanction cruelty against innocents by refusing to commit cruel acts against perpetrators (and thereby humiliate ourselves). In the end, it seems that there are times when force cannot be avoided in order to both alleviate great suffering and ensure the success of our final vocabulary, even if we privately recognize the contingent nature of the liberal commitments we publicly espouse.

That said, his answer at the end of *Contingency, Irony, and Solidarity* is quite different and more hopeful for those who eschew the use of violence in the service of human rights. It is correct that Rorty will not suggest that “the guards at Auschwitz, and the Belgians who watched the Gestapo drag their Jewish neighbors away were ‘inhuman’”¹⁰⁵ because doing so necessitates a belief in our common humanity (despite his implied acceptance of just such a foundation). Likewise, he insists that there is no “moral obligation to feel a sense of solidarity with all other human beings.”¹⁰⁶ Rorty insists that victims of persecution, rather than making an appeal to our common humanity, have traditionally been better served by appealing to a more powerful, more immediate, commonality. Pushing the example of the Holocaust further, he notes:

Did they [non-Jewish Danes and Italians] say, about their Jewish neighbors, that they deserved to be saved because they were fellow human beings? Perhaps sometimes they did, but surely they would usually, if queried, have used more parochial terms to explain why they were taking risks to protect a given Jew – for example, that this particular Jew was a fellow Milanese, or a fellow Jutlander, or a fellow member of the same union or profession, or a fellow bocce player, or a fellow parent of small children.¹⁰⁷

For Rorty, solidarity and sympathy are directly resultant from personal identifications.¹⁰⁸ When those who are suffering “are thought of as ‘one of us,’ where ‘us’ means something smaller and more local than the human race,”¹⁰⁹ the sense of solidarity with them is strongest. Indeed, he suggests that human rights promotion is best served by “[concentrating] our energies on manipulating sentiments, on sentimental education. That sort of education gets people of different kinds sufficiently well acquainted with one another that they are less tempted to think of those different from themselves as only quasi-human.”¹¹⁰ Following Annette Baier, he refers to this plan as “a progress of sentiments.”¹¹¹

In agreement with Rorty on this point is Schulz, the former Executive Director of Amnesty International USA, whose argument is very much based on a Rortyan final vocabulary.¹¹² After detailing human rights abuses in Nigeria, Afghanistan, and El Salvador, he notes,

I am stricken at heart because I have the imagination to know at least in proximate form what the experience, the pain, must have felt like. I am stricken at heart because on some level I identify with the victims; I know what it is to bleed. Although I have never been bitten by a horde of red ants or had a thumb amputated or been crushed by a wall, I have enough acquaintance with human suffering, either my own or that of those I love, that my memory of that acquaintance stokes my recognition.¹¹³

Not everyone, however, finds Rorty's argument compelling. Norman Geras is surprised by

how abstract ... how obviously speculative, Rorty's thesis about the rescuers is. "Perhaps", he suggests, they occasionally said something like this; but "surely" they more often said something like that. These rescuers were real people and there is a body of writing about them.¹¹⁴

On first blush, Geras' detailed examination of the reasons these men and women give for their heroic actions seems damning. After more careful consideration, however, the picture is a bit less clear, as many of those interviewed ascribe their actions to their own religious faith.¹¹⁵ Those who do not – like Eva Anielska, a Polish woman who saved Jews who were strangers to her – took action because each one was "a persecuted human being, desperately struggling for life and in need of help ... a persecuted, humiliated human being."¹¹⁶ Did she save these Jews because she identified with their humanity or with their persecution and humiliation? While this example might support the claims of either Rorty or Geras, there is also the example of Bill Bouwma, who helped Jews "because he knew what it felt like to be the underdog"¹¹⁷ and of Louise Steenstra, who said, "'we felt so sorry for those Jewish people with their kids screaming when the Nazis came in the night to pick them up'; '[w]hen you are the mother of one child, you are mother to them all.'¹¹⁸ We might continue on with additional examples, but at bottom, Rorty's concern is not with creating more heroes like Anielska, Bouwma, and Steenstra; his goal, instead, is to expand everyone's sense of solidarity in order to prevent the human rights violations that require their heroic behavior.

Conclusion

Rorty's theory – as we have seen thus far – seems to deal primarily with attempting to persuade ourselves that someone we identify with is suffering, rather than providing a basis by which we could stop cruelty in those societies (though he implicitly endorses one such basis). The example of the Holocaust is useful once again: Danes and Italians *did* rescue many Jews that they could sympathize with, but little – if anything – was done to

persuade Germans to abandon their genocidal plans. It would seem that a good liberal would be actively practicing the former while also attempting the latter. If not, cruelty toward Jews could continue indefinitely and only those Jews “we” identify with at the time might be saved. The answer is a troubling one to us, but Rorty argues that it is also our only available option. First, it is a troubling solution because “We shall have to accept the fact that the fate of the women of Bosnia depends on whether television journalists manage to do for them what Harriet Beecher Stowe did for black slaves – whether these journalists can make us, the audience back in the safe countries, feel that these women are more like us, more like real human beings, than we had realized.”¹¹⁹ Second, it is disturbing because of the length of time required to make progress. As he notes, “We *resent* the idea that we shall have to wait for the strong to turn their piggy little eyes to the suffering of the weak, slowly open their dried-up little hearts.”¹²⁰ But this, Rorty tells us, is the best we can hope for and, he argues, might achieve its end more quickly than we anticipate: “These two centuries are most easily understood . . . as a period . . . in which there occurred an astonishingly rapid progress of sentiments.”¹²¹

How has the progress of sentiments occurred and what can we do to extend its reach? On this, it will be helpful to quote Rorty at some length:

The right way to take the slogan “We have obligations to human beings simply as such” is as a means of reminding ourselves to keep trying to expand our sense of “us” as far as we can. That slogan urges us to extrapolate further in the direction set by certain events in the past – the inclusion among “us” of the family in the next cave, then of the tribe across the river, then of the tribal confederation beyond the mountains, then of the unbelievers beyond the seas (and, perhaps last of all, of the menials who, all this time, have been doing our dirty work). This is a process which we should try to keep going. We should stay on the lookout for marginalized people – people who we still instinctively think of as “they” rather than “us.” We should try to notice our similarities with them. The right way to construe the slogan is as urging us to *create* a more expansive sense of solidarity than we presently have. The wrong way is to think of it as urging us to *recognize* such a solidarity, as something that exists antecedently to our recognition of it. For then we leave ourselves open to the pointlessly skeptical question ‘Is this solidarity *real*?’ We leave ourselves open to Nietzsche’s insinuation that the end of religion and metaphysics should mean the end of our attempts not to be cruel.¹²²

Most important to note, first, is Rorty’s notion that our sense of who “we” are can be continually expanded to include more and more people. Indeed, Robert Wright notes that Rorty’s argument lines up nicely with Charles Darwin’s thinking in *The Descent of Man*:

As man advances in civilization, and small tribes are united into larger communities, the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all the members of the same nation, though personally unknown to him. This point being once reached, there is only an artificial barrier to prevent his sympathies extending to the men of all nations and races.¹²³

In the end, then, our sense of solidarity could encompass everyone on Earth because of the similarities we all share. Rorty anticipates the charge of universalism, here, and responds by noting that these similarities are not found so much as they are created by telling

the sort of long, sad, sentimental story that begins, “Because this is what it is like to be in her situation – to be far from home, among strangers,” or “Because she might become your daughter-in-law,” or “Because her mother would grieve for her.”¹²⁴

Telling these sorts of stories, he argues, is the most practical method for increasing our sense of solidarity with those we once considered “others.” My sense is that Rorty is correct that focusing on our common humanity will ultimately prove less successful than telling these stories about those who are suffering. Even though we might argue that both their suffering and their right not to suffer actually stem from what we know about the human mind and human nature, human rights advocates are likely to be more successful by increasing our sense of solidarity than by appealing to human universals. Consider, by way of an example, the work of Amnesty International, the world’s largest grassroots human rights organization that, since 1961, has encouraged its members to get involved by telling personal stories about individual prisoners of conscience. In addition to this obvious example, Rorty’s theory receives a great deal of support from a very unlikely source, a Nazi:

Because there were children among the Jews we had brought and at the time I myself was a father with a family of three children, I told the lieutenant something to the effect that I was unable to shoot and asked if he couldn’t assign me to something else.¹²⁵

Given these examples, and notably, this particular testimonial, it makes sense to try out Rorty’s proposal – even though the anti-foundationalism upon which it is built ultimately fails – and to recognize that Rorty has provided us with a compelling non-religious understanding of the idea of human rights against Michael Perry. In addition, his theory – and my extrapolation from it – puts forward a reasonable, distinctly Rortyan defense of our liberal desire to bring about an end to cruelty against those who might favor “a nasty, illiberal rebellion . . . against gentle liberal virtues.”¹²⁶

6 Rights and wrongs without God

A non-religious grounding for human rights in a pluralistic world

In this concluding chapter, I hope to offer a final persuasive refutation of one of the central claims in Michael J. Perry's *The Idea of Human Rights: Four Inquiries*. He argues, in the first chapter of that book, that:

There is no intelligible (much less persuasive) secular version of the conviction that every human being is sacred; the only intelligible versions are religious. . . . The conviction that every human being is sacred is, in my view, inescapably religious – and the idea of human rights is, therefore, ineliminably religious.¹

Conversely, in his most recent book, *Rights From Wrongs: a Secular Theory of the Origins of Rights*, Alan Dershowitz shrugs off Perry's claim and argues that:

It is more realistic to try to build a theory of rights on the agreed-upon wrongs of the past that we want to avoid repeating, than to try to build a theory of rights on idealized conceptions of the perfect society about which we will never agree.²

While I am generally sympathetic with Dershowitz on this point – indeed, I will ultimately argue for what I take to be a more persuasive variant of this claim – he seems to have quite clearly failed to specify how one might determine whether some action is right or wrong. Consider the following paragraphs:

In one important respect . . . this theory of rights is a theory of wrongs. It begins with the worst injustices: the Crusades, the Inquisition, slavery, the Stalinist starvation and purges, the Holocaust, the Cambodian slaughter, and other abuses that reasonable people now recognize to have been wrongs.

The ongoing nature of the righting process – and the fact that there is no consensus with regard to perfect justice – does not require that we ignore the wrongs of obvious injustice or allow those who

advocate or inflict them to fall back on moral relativism as a justification for immorality.³

We would be remiss, I think, if we failed to push Dershowitz on the question of how he *knows* that the Holocaust or slavery are actually wrongs. The only answer he provides is that “every reasonable person now recognizes that slavery was a grave injustice.”⁴ But this is obviously not the case, as can be attested to by the continued need for non-governmental organizations like Anti-Slavery International, the existence of contemporary first-person slave narratives, and – of course – the fact of slavery as a persistent violation of human rights around the world today.⁵

While Dershowitz might argue that those who continue to enslave others are both behaving unreasonably and committing an injustice, he has done very little to explain why that is necessarily the case beyond simply asserting it. Further, he states that “We have seen injustice and we now know it, even if some did not know it at the time it was being perpetrated.”⁶ While it might very well be the case that his list of injustices is correct, the trouble with this argument is two-fold: first, it means human rights can only be reactive and, second, it means that the victors determine rights and wrongs. The Holocaust, on this reading, was not objectively wrong and it was not necessarily wrong while it was being perpetrated; it is considered a wrong today because the Nazis lost World War II to those who believed it to be a wrong and at the time it was an open question about which reasonable people might have disagreed. As Dershowitz notes, “What constitutes perfect justice remains debatable among decent and intelligent people today, but no such people would debate the injustice of the Holocaust or other instances of deliberate, mass genocide.”⁷ This suggests that “decent and intelligent people” debated whether or not the Holocaust was just while it was occurring – and they did.⁸ More than that, though, it is clear that people continue to debate – and, worse, to commit – genocide. Labeling such people indecent or unintelligent does precious little to convince them to give up their genocidal plans because it fails to specify *why* genocide is an obvious wrong.

This problem is by no means a new one; it has been puzzled over at least since the time of Herodotus. In *The Histories*, he gives the quintessential example of the many differences that exist in people’s traditions and customs:

When Darius was king, he summoned the Greeks who were with him and asked them for what price they would eat their fathers’ dead bodies. They answered that they wouldn’t do it for any amount of money. Then Darius summoned those Indians who are called Callatae, who eat their parents, and asked them (the Greeks being present and understanding through interpreters what was said) what would make them willing to burn their fathers – at death. The Indians cried

aloud, that he should not speak of so horrible an act. So firmly rooted are these beliefs; and it is, I think, rightly said in Pindar's poem that custom is king of all.⁹

Does this mean that cross-cultural dialogue is an impossibility, that we will necessarily remain at odds when it comes to determining a list of rights and wrongs? Presumably, both the Greeks and the Indians would have responded – if questioned further – that their decision to either burn or eat their dead was based on what they took to be a sacred obligation, to use Perry's terminology. While there might very well be no clear way to determine whether one of these groups was right and the other wrong, it seems to me that we need not reach Herodotus' (and Pindar's) conclusion that "custom is king of all." Although Dershowitz's secular theory of rights does not offer us a reason to think that slavery or the Holocaust are wrongs and Perry's religious theory does, I believe that a refutation of Perry's argument is needed for two reasons. First, there are many non-religious people with firm convictions about human rights and it is strange to think they might not hold an intelligible view. Second, a compelling non-religious foundation would make it easier for an ever-widening group of individuals around the world to reach a consensus on the manner in which they ought to treat one another, even if – with Herodotus in mind – they are unable to reach any other agreement. Prior to any such attempt, however, it is necessary to engage in a discussion of what it would take to provide a persuasive justification for the idea of human rights generally. Here, I argue for the necessity of inclusivity, persuasiveness, and practicality to any foundation of human rights.

Earlier, I examined Perry's line of reasoning in detail, arguing that in a pluralistic world – one in which most people do not hold the same religious worldview and many hold worldviews that would not fit within Perry's definition of religion¹⁰ – a wider framework is needed to ground the idea of human rights. This is, of course, quite different from showing that Perry is incorrect about religion providing a compelling grounding for human rights and I do not think he is. The language of human dignity, upon which the concept of human rights rests, can certainly find a solid foundation in many of the world's great religious texts, especially – as Perry notes – the Christian Gospels. The Christian language of love and respect for the other, as well as of the equality of persons, provides a strong justification for the belief that people ought to be treated with respect and compassion, and that they ought not be abused or otherwise harmed. That said, this appeal to Christian love will not necessarily be persuasive or compelling to those who do not share the Christian worldview, despite Perry's desire for his religious foundation for human rights to be persuasive to others. Moreover, his claim that religious worldviews provide the only intelligible foundation for the idea of human rights seems to fly in the face of ample evidence that such worldviews can also be

compatible with beliefs and behavior completely antithetical to the idea of human rights. While this argument does not invalidate Perry's claim, it is important to note, first, that religious people may violate others' human rights on the basis of their interpretation of a final reconciliation and of ultimate meaning and, second, that Perry's definition of religion is expansive enough to include worldviews that are opposed to the idea of human rights. From this account of Perry's theory come two important facets of providing an adequate justification for the idea of human rights, those of *inclusivity* and *persuasiveness*, which I believe he fails to provide. In other words, a compelling foundation for the idea of human rights must speak to the largest possible number of people from the greatest number of different traditions and must also provide reasons for its account that are persuasive to those people. As Jürgen Habermas argues, "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."¹¹ Failing to satisfy these conditions leaves us with human rights that are partial and local, as opposed to universal; on my reading, this failure also prohibits me from making any claims that go beyond my own subjective understanding of how human beings ought to treat one another.

In an attempt to locate a non-religious grounding for human rights that fulfills these conditions, we must also be careful not to minimize or overlook entirely the indignity, injustice, and cruelty that are central to the human rights discourse. Any examination of human life that discusses only theoretical harms or abstracts away from abuses removes the discussion too far from the real world in which human rights are actually violated. And, indeed, this problem of excessive abstraction can also be found in Perry's argument, for his stated goal is to argue against the existence of an intelligible secular foundation for the idea of human rights. In framing his argument this way, he seems primarily concerned with theoretical or metaphysical argumentation, divorced from the real world. This highly abstract argument, one in which the validity of the claims behind Perry's religious foundation are not even considered, is almost immediately tempered by Perry's decision to turn to the real-world problem of refuting a genocidal Serb. While this task might well set the bar for any theory of human rights impossibly high, Perry makes use of it to refute Ronald Dworkin's interesting non-religious idea about the source of human dignity and human rights. While I ultimately agree with Perry's conclusion that Dworkin's argument is unsatisfying for a variety of reasons, I also argued in the third chapter that Perry's most damning critique changes the terms of the debate entirely and opens up some space for us to consider the importance of including the concept of *practicality* in this discussion. For Perry argues that Dworkin's theory fails because it is entirely subjective and thus cannot be used to persuade those who abuse human rights. It seems to me, however, that Perry's own argument for religion as the foundation of human rights is ultimately likely to meet the same fate; it finally must run

up against Wittgenstein's claim, "If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'"¹² While the religious believer is free to claim that the concept of human sacredness is, in fact, objectively true, this truth claim is not verifiable and Perry even suggests that he has no intention of trying to prove the "claim that every human being is sacred and therefore one attacks the normative order of the world – including one's own deepest nature – when one violates human rights."¹³ This discussion reveals what I take to be the justificatory limits of metaphysical argumentation, namely that it makes claims about objective truth that are persuasive only to those who either already share or can be convinced of the validity of the core beliefs upon which the claims in question rest. Perry and Dworkin are free to believe whatever it is that they would like to believe – just as I may justify my own beliefs in any way I might like – but they ought not assume that anyone else will be convinced by the same reasoning that convinces them. In our attempts to justify our foundational beliefs to others, we ultimately reach a point beyond which we can rationally argue no further. This is true whether our beliefs are based in religion, nature, or reason. In Perry's case, one must be convinced not simply that all human beings are sacred; one must already hold the belief or be convinced that God exists to guarantee that human sacredness.

At this point, my project turns from a metaphysical to a practical, political one. No longer are we concerned with providing an intelligible non-religious foundation for the idea of human rights *for its own sake*; instead, our goal has become to provide a foundation that can be said to speak to the problem of human rights as it exists in the world, to consider what Jürgen Habermas terms the "basic questions" of practical philosophy: "What ought I do?" or "What is good for us in the long run and on the whole?"¹⁴ These questions, he notes, have been taken "from everyday life in an unmediated way [and treated] without the objectivating filter of social science."¹⁵ In this chapter, I put forward what I take to be a non-religious foundation for human rights that goes a long way toward fulfilling the necessary justificatory conditions of inclusivity, persuasiveness, and practicality that I have outlined above. In contrast to the theories of both Michael Perry and Ronald Dworkin, I argue that there might not actually be a feature or quality inherent in human beings from which our rights spring. Indeed, I believe that searching for rights-grounding aspects of human nature has led many non-religious rights theorists astray. Following Richard Rorty, I contend that these features or qualities are not found so much as they are created. While I believe that Rorty's theory – that telling sentimental stories is the most practical method for increasing our sense of solidarity with those we once considered "others"¹⁶ – is an interesting response to Michael Perry, I will depart from it here because I think Rorty is unsuccessful in abandoning the idea of universal truths about human nature. Though I agree with Rorty – indeed, I fleshed out and made

explicit his implicit argument in the previous chapter – I instead make a procedural and practical argument here, one that steps back from arguments about a universal human nature. To do so, I claim that human rights represent a political consensus of overlapping ideas from cultures and communities around the world. In the end, I argue that the Universal Declaration of Human Rights (UDHR) provides us with all we need to defend human rights; in particular, I contend that the process by which it was drafted and the deliberations surrounding the subsequent human rights instruments represent the best possible proof of the universal applicability of the rights that they espouse.

Constructing the foundation: a reply to cultural relativism

There is something about the idea of social construction that is at once exciting and unsettling. As Ian Hacking argues, “Social construction has in many contexts been a truly liberating idea, but that which on first hearing has liberated some has made all too many others smug, comfortable, and trendy in ways that have become merely orthodox.”¹⁷ The lion’s share of the trouble, it seems, stems from the fact that no one is really sure what social construction actually means and many feel that someone out there sees the overused phrase as an all-or-nothing concept; it either applies to quarks in the same way as it does to ideas or it doesn’t apply at all. On this point, Hacking notes that:

We require someone who claims that every object whatsoever – the earth, your feet, quarks, the aroma of coffee, grief, polar bears in the Arctic – is in some nontrivial sense socially constructed. Not just our experience of them, our classifications of them, our interests in them, but these things themselves.¹⁸

Quite clearly, however, he argues that this view of social construction is mistaken, that no one is actually arguing for the social construction of *everything*.

To make his point, he examines Andrew Pickering’s argument in the controversially-titled book *Constructing Quarks*, and notes that “Pickering does not claim that quarks, the objects, are constructed.”¹⁹ Instead, the upshot of the book is that the *idea* of a quark is constructed and, along Rortyan lines, that scientists’ arrival at the quark is a story about contingency. “Pickering,” he says, “never denies that there are quarks. He maintains only that physics did not have to take a quarky route.”²⁰ While this view remains contentious, especially amongst physicists, it is instructive for this project because human rights and the idea of human dignity upon which they are based are quite dissimilar from quarks. While a quark is an object, like a polar bear or your feet, a human right is not. Rights are theoretical; in some very real sense, they do not exist in the world until we say

they do. As Arthur C. Danto argues, “This is the way it is with rights. You want ‘em, so you say you got ‘em, and if nobody says you don’t, then you do.”²¹ The trouble with this formulation, as Alan Gewirth rebuts, is that it

ignores such questions as these: what if someone, like, say, Brezhnev or Pinochet, says you *don’t* have the rights? Does this, therefore, go any way toward *establishing* that you don’t?... To make rights dependent entirely on declaration and recognition would mean that slaves and other oppressed groups would have no rights even in the sense of moral justification.²²

I intend to demonstrate that Danto is right about rights, in a sense, while also answering Gewirth’s concern as best I can, making use of the concept of social construction in arguing for a non-religious foundation for the idea of human rights. Following Hacking, I take social construction to mean a contingent process that applies to the development of ideas rather than objects in the world. In making this argument, I am mindful of the problem articulated above by Gewirth and reiterated by William F. Schulz:

Such a concept of rights does not lend them the kind of irrefragable authority that God’s will or Nature’s command might. Theoretically, the Universal Declaration could be rescinded or amended. Human concepts of rights *do* change and there is no reason to believe that today’s notions and norms will be identical to those of the twenty-second century any more than our norms are identical to those of the nineteenth.²³

If both the idea of human rights and its foundation, human dignity, are socially constructed and thus open to reinterpretation – by advocates as well as by those who do not respect them – how can they be said to be *grounded* in any real sense?

To begin, let us consider the particular episode of social construction in question. Unlike the theories I briefly considered above, which attempted to construct free-standing justifications for the idea of human rights, the remainder of this chapter looks at the manner in which people actually came to argue for and agree upon the human rights norms of the post-World War II era. It is well-known that the Universal Declaration of Human Rights is a product of one of the United Nations’ earliest established committees, the Economic and Social Council’s Commission on Human Rights. The Declaration was drafted and edited under the chairmanship of Eleanor Roosevelt, though she did not remain at the Commission’s helm during the push for its passage by the General Assembly. That task fell to Charles Malik of Lebanon, who had served as the Commission’s rapporteur and one of the Declaration’s chief framers from the beginning. Members of the Commission came from eighteen different

nations, thirteen of whom alternated at three-year intervals and five of whom – the United States, the Soviet Union, the United Kingdom, France, and China – were permanent. In addition to these permanent members, about whom much will be said, the first members of the Commission represented a diverse body of nations: Australia, Belgium, Byelorussia, Chile, Egypt, India, Iran, Lebanon, Panama, Philippines, Ukraine, Uruguay, and Yugoslavia.²⁴ And, as can be imagined, the route by which people from such divergent political, religious, economic, and moral backgrounds came together to form a document of such importance was circuitous, challenging, and quite often contentious.

It is often argued that the Declaration is a document enshrining not human but Western rights and that, consequently, the claim to universality in its title is wishful thinking at best and cultural imperialism at worst. An excellent summation of a variety of these arguments is undertaken by Heiner Bielefeldt, and it is worthwhile to quote him at some length:

“Human Rights: A Western Construction with Limited Applicability” is the polemical title of an article by Pollis and Schwab, two representatives of cultural relativism and most outspoken critics of universal human rights. Pollis and Schwab argue that since human rights originated historically in Western Europe and North America, they are essentially connected – and indeed confined – to the cultural and philosophical concepts of the Occidental tradition.... Fikentscher, a German lawyer and historian, locates the historic origin of human rights in the sixteenth-century Netherlands, that is, in the context of the Dutch Protestant liberation movement against the Spanish Catholic occupation. With regard to the originally Christian motives underneath the Dutch struggle for rights and liberties, Fikentscher asserts ironically that “the mainly secular-minded ‘Western’ reformers” in Third World countries unconsciously propagate Christian values: “not knowing what they are doing, they actually continue Christian missionary work.” The most prominent contemporary representative of an essentialist “Western” understanding of human rights, however, is Huntington, the prophet of the danger of a “clash of civilizations.” In his global political map, human rights – as well as democracy, liberalism, and political secularism – belong exclusively to Western civilization. Huntington is convinced that universalism of human rights is bound to fail. For people from other civilizations, he says, the only way to have full access to human rights is to adopt essentially “Western” values and hence to implicitly “convert” to Western civilization.²⁵

Having laid out these arguments, Bielefeldt attempts to provide a refutation by noting that, while “Human rights certainly did not develop in a vacuum,”²⁶ there are very similar conceptions to be found in a variety of non-Western philosophical and religious traditions. While this is certainly

correct, I believe that an even more direct refutation of cultural relativism is offered by an examination of the Universal Declaration's drafting process itself.

The beginning of such a refutation can be found in the decision of the UN's Educational, Scientific and Cultural Organization (UNESCO) to create a Committee on the Theoretical Bases of Human Rights. "This blue-ribbon panel, chaired by Cambridge political historian E.H. Carr, [and including] University of Chicago philosopher Richard McKeon as rapporteur and French social philosopher Jacques Maritain,"²⁷ began its work, in March 1947, by drafting and sending out a "questionnaire asking for reflections on human rights from Chinese, Islamic, Hindu, and customary law perspectives, as well as from American, European, and socialist points of view."²⁸ By June, they had received some seventy responses from experts across the globe.²⁹ Philosophers, political scientists, poets, and novelists from India to Italy confirmed the Committee's suspicions: "the sources of human rights were present in their traditions, even though the language of rights was a relatively modern European development."³⁰ To cite just two examples, consider the responses of Indian political scientist, S.V. Puntambekar, and Humayin Kabir, the Bengali Muslim poet and philosopher. The former notes

that great Hindu thinkers had 'propounded a code, as it were, of ten essential human freedoms and controls or virtues necessary for good life': five social freedoms ('freedom from violence, freedom from want, freedom from exploitation, freedom from violation and dishonor and freedom from early death and disease') and five individual virtues ('absence of intolerance, compassion or fellow-feeling, knowledge, freedom of thought and conscience, and freedom from fear, frustration or despair').³¹

The latter writes of the importance of making the concept of human rights both universal and egalitarian:

The "fundamental flaw in the Western conception of human rights" was not in the idea, but in the frequent failure to live up to it. "In practice," ... human rights "often applied only to Europeans and sometimes to only some among Europeans."³²

Many of the responses – including those of Chung-Shu Lo, Teilhard de Chardin, Salvador de Madariaga, and Mohandas Gandhi – mentioned the importance of considering what Chinese diplomat Peng-chun Chang explained to his fellow Human Rights Commissioners "as two-man mindedness: 'a sympathetic attitude of regarding all one's fellow men as having the same desires, and therefore the same rights, as one would like to enjoy oneself.'"³³

The similarities that could be identified in responses from such divergent traditions proved quite helpful to the fledgling project of drafting a universal human rights document. As Glendon notes, "Finding that several practical concepts constituted 'a sort of common denominator' among widely separated ideologies, the philosophers pronounced themselves 'convinced that the members of the United Nations share common convictions on which human rights depend.'"³⁴ The Committee's report itself ties these findings together nicely:

Varied in cultures and built upon different institutions, the members of the United Nations have, nevertheless, certain great principles in common. They believe that men and women all over the world have the right to live a life that is free from the haunting fear of poverty and insecurity. They believe that they should have a more complete access to the heritage, in all its aspects and dimensions, of the civilization so painfully built by human effort. They believe that science and the arts should combine to serve alike peace and the well-being, spiritual as well as material, of all men and women without discrimination of any kind.³⁵

These endorsements, from some of the world's leading men of letters, did more than simply confirm the suspicions of UNESCO's philosophers; they lent a great deal of weight to the project that Roosevelt and her Commission colleagues had undertaken. Today, they are able to play another prominent role, though very little time is currently spent examining them. In my estimation, they do a good deal of damage to the claim, outlined above, that the Universal Declaration of Human Rights is nothing more than a tool of Western imperialism in the guise of universalism. For these responses show that there is substantial cross-cultural agreement on the idea of human rights upon which the UDHR could be built.

In addition to this interesting and important work by UNESCO, the claim that the idea of human rights is limited by its Western origin fails to take into account the active participation of Human Rights Commissioners like Hansa Mehta of India, Carlos Romulo of the Philippines, and Hernán Santa Cruz of Chile in drafting the Universal Declaration. In addition, two of the most prominent and vocal members of the Commission were not Westerners: Charles Malik of Lebanon and China's P.C. Chang. The two became quite well-known for both their ability to work together and their heated arguments about the theory of rights that would buttress the Declaration; each wanted to ensure that the final document represented a vision embraced by their particular culture, but both were also able, to a degree, to transcend those cultures to theorize on a more global scale. As Mary Ann Glendon describes them:

The occasional skirmishes between Chang and Malik in the Human Rights Commission had been partly clashes between two strong

personalities, partly a confrontation between religious and secular worldviews, and partly disagreements about how far one could go in the direction of pragmatic compromises without putting truth, and therefore universality, up for grabs. Malik believed the Declaration should be anchored more explicitly in “nature,” Chang thought it better to leave it up to each culture to supply its own account of the philosophical underpinnings of human rights. Both men’s ideas had been unsettled by the “transvaluation of values” in the post-Nietzschean, postwar world, but neither was ready to give up on values altogether.³⁶

Of course, a common rejoinder is that the two diplomats were capable of this sort of work on the Declaration precisely because both had, in some sense, left the experience of the non-Western world behind them. After all, Chang and Malik had both been educated in the West – the former earning his doctorate from Columbia University and the latter from Oxford – and both spent a great deal of their adult lives away from home. To this critique about a possible Western influence on Chang and Malik, Glendon responds that “their performance in the Human Rights Commission suggests something rather different. Not only did each contribute significant insights from his own culture, but each possessed an exceptional ability to understand other cultures and to ‘translate’ concepts from one frame of reference to another.”³⁷

If we accept, as I believe we should, that the multiculturalism of the Declaration’s drafters themselves serves as the beginnings of an argument for its universality, we have taken a significant step toward the completion of a non-religious foundation for the idea of human rights that is based on the UDHR itself. That said, there remain several significant challenges unanswered. First, not everyone was invited to the table to help create the Universal Declaration and second, even if they had been or have contributed to the dialogue since, what justificatory weight does their agreement actually hold? The first argument is, as Glendon notes, “that much of the world’s population was not represented in the UN in 1948: large parts of Africa and some Asian countries remained under colonial rule; and the defeated Axis powers – Japan, Germany, Italy, and their allies – were excluded as well.”³⁸ Glendon’s response to this challenge is that:

Not every country in the world had its say, but many did, and their response supported the UNESCO philosophers’ conclusion that a few basic practical concepts of human rights are so widely shared that they ‘may be viewed as implicit in man’s nature as a member of society’.³⁹

Bielefeldt reaches a similar conclusion, arguing that:

It is especially the idea of human dignity that can connect human rights with different religious, philosophical, and cultural traditions

because the insight into the unalienable dignity of every human being constitutes both the basic ethical principle of human rights and a central element of the teachings of various religions and philosophies. The “Project on Religion and Human Rights,” based in New York, has come to the conclusion that “there are elements in virtually all religious traditions that support peace, tolerance, freedom of conscience, dignity and equality of persons, and social justice.”⁴⁰

Of course, this important point about dignity as a universal concept remains somewhat contentious. Rhoda Howard and Jack Donnelly, for example, argue

that internationally recognized human rights require a liberal regime. Other types of regimes, and the conceptions of human dignity on which they rest, may be defensible on other moral or political grounds, but they will not stand up to scrutiny under the standard of human rights.⁴¹

Apart from being surprisingly ethnocentric, Howard and Donnelly’s argument seems rather incomplete. They assert, for example, that traditional societies – defined as “communal, status-based societies, governed according to principles and practices held to be fixed by tradition”⁴² – do not share the Western conception of dignity upon which human rights are based:

One’s dignity – which usually is conceived primarily as an attribute of one’s kinship, age, sex, or occupational group – is obtained or validated by discharging the (traditionally defined) duties of one’s station, rather than by autonomously creating or unfolding a unique individual existence. In traditional society, there are neither human beings, in the relevant moral sense, nor equal, inalienable, and universal rights.⁴³

This seems to be far from a complete picture of the concept of dignity in traditional societies (which include, but seem not to be limited to, all of Africa and every sort of Islamic society),⁴⁴ and Howard and Donnelly offer only one reference for their assertions.⁴⁵

A far more thorough examination of the problem is undertaken by Abdullahi Ahmed An-Na’im, who offers a middle ground between Glendon and Bielefeldt, on the one hand, and Howard and Donnelly on the other. In discussing the problem of cruel, unusual, and degrading treatment with reference to Qur’anic punishments, he notes that “On the one hand, it is necessary to safeguard the personal integrity and human dignity of the individual against excessive or harsh punishments. . . . On the other hand, it is extremely important to be sensitive to the dangers of cultural

imperialism.”⁴⁶ It is not that Islamic societies do not understand the idea of human rights or have a different conception of dignity; instead, An-Na'im argues that the benefits to both the individual and society seem to outweigh the costs. In addition to the deterrent effect of the punishment, for example:

In the next *eternal* life, every human being will stand judgment and suffer the consequences of his or her actions in this life. A religiously sanctioned punishment, however, will absolve an offender from punishment in the next life because God does not punish twice for the same offence.⁴⁷

An-Na'im's reasoned response to this dilemma is an interesting one because it recognizes the challenge that traditional societies can present to the idea of human rights but also highlights the possibility for societal change based on cross-cultural dialogue about commonalities with the West. In his own words:

there is room for agreement on a wide range of substantive and procedural matters even in relation to an apparently inflexible position, such as the Islamic position on Qur'anic punishments. Provided such agreement is sought with sufficient sensitivity, the general status of human rights will be improved, and wider agreement can be achieved in relation to other human rights.⁴⁸

Rights by committee and the idea of an overlapping consensus

This notion of cross-cultural dialogue is, in some sense, precisely what took place when the Human Rights Commission began the work of enumerating, revising, and then defending its list of rights. As the Commissioners represented a great many different cultures, religious traditions, and political systems, there were heated debates about the wording of nearly every one of the thirty articles, as well as of the introductory clauses. Much of the trouble, however, was not cultural, coming instead in the form of a series of alternating Soviet representatives. They had been instructed to dig in their heels on what Moscow viewed as potential threats to the concept of national sovereignty: “the right to freedom of movement, the right to a nationality, a nation's right to accord asylum to political refugees, and protections against arbitrary expulsion from a country.”⁴⁹ Other arguments arose around the difficult question of how implementation of the rights in the UDHR would be achieved⁵⁰ and the charge, again from the Soviets, “that the United States wanted a Declaration that was as ‘short and empty as possible.’”⁵¹ From the beginning, though, the greatest point of contention centered around the idea of

grounding the rights that the Declaration set out. After having arrived at what seemed to be some agreement on the text as drafted first by Canada's John Humphrey, revised by France's René Cassin, and finally amended by a working group, the Commission revisited the draft as a whole and focused on the language of each article:

The full Commission once again consumed much precious time arguing over Article 1's general statement concerning the human person. Cassin and [the Phillipines' Carlos] Romulo, in the working group, had slightly revised the first article to read: "All men are brothers. They are endowed by nature with reason and conscience. They are born equal in dignity and rights." [Lebanon's Charles] Malik . . . now proposed substituting the words "by their Creator" for "by nature." He cited the American Declaration of Independence ("endowed by their Creator with certain unalienable rights"). That amendment was opposed by Cassin on the grounds that references to God would undermine the universality of the document. [The Soviet representative, Alexander] Bogomolov moved to drop the entire article, saying that it made no sense to clutter up the document with vacuous assertions, whether they were drawn from eighteenth-century French philosophy or from the Bible.⁵²

This discussion demonstrates the challenge inherent in any cross-cultural attempt to ground the idea of human rights. Malik, for example, felt that it was important to assign the source of our rights to a Creator, while this sort of focus, for Cassin, could damage the document's acceptability for a great many people.

Though Cassin ultimately persuaded his fellow Commissioners of the importance of leaving the document – and, in particular, its first article – free of any statements that might take away from its claim to universality, the question of grounding the Declaration's rights was far from settled. In the point-by-point discussion of each of the Universal Declaration's thirty articles that took place in committee before it could move to the General Assembly for a vote, the drafters were called upon to defend their decisions with respect both to the language used and the rights that were chosen. The first article remained one of the most contentious, not the least because it is a statement about human nature rather than an enumeration of a right. After this fire had been quelled by Roosevelt, who explained that "Article 1 did not refer to specific rights because it was meant to explain why human beings have rights to begin with,"⁵³ the discussion shifted to an amendment by the Brazilians to include the words, "all human beings are created in the image of and likeness of God."⁵⁴ This proposal was ultimately defeated, but only after Chang stepped in to defend the universal applicability of the article as it stood:

His own country, he pointed out, comprised a large proportion of humanity, and its people had ideals and traditions different from those of the Christian West. Chinese ideals included good manners, decorum, propriety, and consideration for others. Yet he, as the Chinese representative on the Human Rights Commission, had refrained from proposing those ideals for inclusion in the Declaration. . . . Article 1 as it stood, Chang said, struck just the right note by calling upon all men to act toward one another in a spirit of brotherhood. That was consistent with the Chinese belief in the importance of considerate treatment of others – and also with the ideals of eighteenth-century Western thought. The first line of the article, therefore, should refer neither to nature nor to God. Those who believed in God, he suggested, could still find the idea of God in the strong assertions that all human beings are born free and equal and endowed with reason and conscience.⁵⁵

Chang's argument is an important one, as it outlines how each culture might find their own particular vision within even the most controversial articles. "‘As only he can do,’ wrote Humphrey, Chang reminded his fellow delegates that each culture's contributions had to be made with a view toward producing a document ‘meant for all men everywhere.’"⁵⁶ This did not mean, as some were afraid, that one culture or another would have to compromise values or traditions; instead, it meant that the document had to represent what John Rawls would term, years later, an overlapping consensus.⁵⁷

The idea of an overlapping consensus is the backbone of the sort of liberalism that Rawls envisions, one in which the principles of justice outlined in *A Theory of Justice* can be established and flourish.⁵⁸ On this point, he says:

Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy. . . . Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.⁵⁹

Seeking that endorsement on the evening of December 9, 1948, Malik took the podium to introduce the Universal Declaration to the General Assembly. In doing so, he recognized the unusual nature of the document before him: "Unlike previous declarations of rights that had sprung from particular cultures, he said, the Universal Declaration was something new in the world."⁶⁰ Its uniqueness, clearly, stemmed from the agreement it represented between so many divergent cultures and traditions on an issue,

the grounding of human rights, that was vastly contentious. And, indeed, Malik points out exactly this fact in his speech. As Glendon highlights:

Malik pointed each country to places in the Declaration where it could either find its own contribution or the influence of the culture to which it belonged. . . . Due to the immense variety of its sources, the Declaration had been constructed on a “firm international basis wherein no regional philosophy or way of life was permitted to prevail.”⁶¹

This quotation from Malik’s speech begins to lead us down the wrong path through its assertion that no single philosophical or religious tradition – what Rawls calls a comprehensive doctrine – won out over any other, for I want to argue that the Universal Declaration represents a much greater achievement. It is not simply that no single tradition was victorious in setting out the foundation of human rights that others could accept, though it is true that none was; instead, the Declaration’s virtue is that everyone was able to agree upon and endorse a *common* foundation: the dignity of the human person. This is true of the General Assembly in 1948 – the Declaration was approved without a single vote cast against it – and it holds true to an even greater extent more than fifty years later.⁶² As Donnelly points out, in an argument similar to mine, “The increasing political prominence of human rights over the past few decades has led more and more adherents of a growing range of comprehensive doctrines to endorse human rights – but (only) as a political conception of justice.”⁶³ This caveat, important for Donnelly’s argument that there remain some comprehensive doctrines anathema to the idea of human rights, is noteworthy here for a different reason. The distinction between comprehensive doctrines and political conceptions of justice is a vitally important one for Rawls’ argument about achieving an overlapping consensus. As Donnelly notes: “Because the latter address only the political structure of society, defined (as far as possible) independent of any particular comprehensive doctrine, adherents of different comprehensive doctrines may reach an ‘overlapping consensus’ on a political conception of justice.”⁶⁴ In other words, we may be unable to come to any agreement where our religious or philosophical traditions and beliefs are concerned, but this need not prevent us from coming to consensus on a political conception of justice. Indeed, we may find our comprehensive doctrines quite at odds, but this is precisely why Rawls counsels us to leave them out of our political deliberations. In his own words, “we do not put forward more of our comprehensive view than we think needed or useful for the political aim of consensus.”⁶⁵

This argument, that the Universal Declaration represents a Rawlsian overlapping consensus, is not a new one; it is put forward persuasively by Jack Donnelly. I agree with Donnelly’s assessment that:

Even where citizens do not have a particularly sophisticated sense of what a commitment to human rights means, they respond to the general idea that they and their fellow citizens are equally entitled to certain basic goods, services, protections, and opportunities. The Universal Declaration, I would suggest, offers a good first approximation of the list that they would accept, largely irrespective of civilization, after considerable reflection.⁶⁶

But I take the argument a step further, as I do not believe that Donnelly's conception of the overlapping consensus represented by the UDHR speaks to the problem posed throughout this chapter. In other words, we differ in the *substance* of that consensus, as he believes that it centers around the rights that the Commission enumerated rather than the foundation of those rights. On that question, Rawls recommends silence and Donnelly seems to be in agreement with him, noting only that the consensus has formed around "something very much like Ronald Dworkin's idea that the state is required to treat each citizen with equal concern and respect."⁶⁷ In my estimation, Donnelly is not saying much more, here, than the state is required to respect citizens' human rights, which – clearly – is the consensus established by the UDHR. More importantly, though, I want to argue that its drafters arrived at a consensus on the *reason* behind the requirement that the state respect human rights; this, I argue, is the idea that human beings have dignity and it is this consensus that makes the Declaration unique in comparison to all of the previous rights instruments that human beings have drafted.

And yet, I also want to argue that it is more than this cross-cultural understanding that human beings have dignity that grounds the contemporary human rights regime. For the notion that human beings possess dignity seems to open the door to yet another question; that is, one must wonder from where we have acquired this dignity. And, in so wondering, we are back at the problem first outlined by Michael Perry, namely whether the concept of dignity – like its religious coeval, sacredness – can be understood in the absence of a religious cosmology. This is the sort of problem that Rawls wants to help us to avoid by telling us to keep quiet about our comprehensive doctrines when we enter into deliberations over political conceptions of justice. It seems to me, though, that we do not need to flinch from this sort of discussion because the international community has already agreed on the answer to Perry's questions; indeed, I want to argue that it is the experience of coming to consensus on the question of a foundation for human rights that provides the concept's grounding. Human dignity and the human rights that stem from it, on my reading, are socially constructed ideas in the way that, for example, quarks and polar bears are not. But this, I think, is necessarily going to be true simply because dignity and rights are ideas rather than objects. As such, it seems to me that they must be constructed; ideas, after all, do not exist in

the world independently of human experience in the way that polar bears do. I am confident that polar bears would exist in the absence of human beings; human dignity, however, would not. It might be the case, then, that human beings actually have inherent dignity and it might not be; the matter is, as Gewirth notes, not empirically verifiable.⁶⁸ That said, whether or not our dignity is something real, something that actually exists in the world, it is incumbent upon all of us to act as though it is, as though it does, because we have agreed to do so.

Can consensus have justificatory force?

This entire discussion raises the interesting, controversial, and related problems of whether consensus itself can have morally justificatory force and whether agreement is a sufficient guide on questions of right action.⁶⁹ As Habermas correctly points out, “Communicative reason . . . does not itself supply any substantive orientation for managing practical tasks – it is neither informative nor immediately practical.”⁷⁰ While I have been implicitly arguing that the overlapping consensus on the idea of human rights has justificatory power and obligates us to act in accordance with the rights enshrined in the Universal Declaration, I must also note the powerful counterexamples presented by Nazi Germany and American slavery, both of which established a consensus that defenders of human rights consider obviously immoral and criminal. While it is clear that Germans reached a consensus on (or at least majority support for) the anti-Semitic Nazi regime and the American South reached a consensus on slavery, those agreements are notably different from the one described in this chapter. In what sense, though, is this consensus different? How is it possible for one sort of consensus to have justificatory weight while others do not? There are, I maintain, a number of conditions that must be met for any given consensus to have justificatory power and I will argue that this particular consensus meets those conditions. Following Habermas, I argue first that “the claim to legitimacy on the part of a legal order built on rights can be redeemed only through the socially integrative force of the ‘concurring and united will of all’ free and equal citizens.”⁷¹ A chief difference, then, is that the consensus on human dignity and human rights – unlike those of Nazism or the antebellum American South – is the result of a highly participatory process, one that accepted input from a more diverse group than had ever been assembled. As we have seen, both the UNESCO philosophers’ committee and the Human Rights Commission included members of newly-independent nations, representatives from socialist and capitalist countries, spokespersons from the powerful and the weaker states alike, and officials from both the East and West. Discussions on the foundations of human rights and on the content of the UDHR engaged a politically, culturally, religiously, economically, and geographically diverse group, one that was representative of the fledgling

United Nations itself. By contrast, any potential consensus on genocide or slavery quite clearly fails to take into account the dissenting voices of the groups targeted by those policies and their allies. While the agreement on human dignity and human rights might not have been unanimous, it was certainly overwhelming. The same cannot be said of a less-participatory consensus.

Of course, as noted earlier, there were a great many groups not represented in these deliberations. Indeed, a wide array of the nations and groups recognized today were not acknowledged at the time of the UDHR's drafting. Examples are easy to come by and certainly include the myriad African states granted independence in the decades succeeding World War II, indigenous peoples around the globe, and groups – like lesbians, gays, bisexuals, and transgendered people – that are still unrecognized in some parts of the world today. That said, I want to argue that this seeming weakness actually helps to demonstrate a strength of this particular consensus. Once again following Habermas, I argue that a second necessary component of a legitimate consensus is that “the decisions of the legislature . . . are both contingent and revisable.”⁷² In the case of this particular consensus, it is clear that the process did not end with the drafting and passage of the Universal Declaration. For although the UDHR itself has not been amended and has achieved, many argue, the status of customary international law, an entire group of increasingly inclusive institutions has arisen from this auspicious beginning. The process that began with the drafting of the Declaration has evolved to include such diverse entities as the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the draft Declaration on the Rights of Indigenous Peoples, and the Convention on the Rights of the Child. In addition, it is notable that the newly independent states of the Organization of African Unity went on to draft their own declaration of rights – the African [Banjul] Charter on Human and Peoples' Rights – that recognizes their desire “to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.”⁷³ While some critics suggest that the revisable nature of the Universal Declaration might leave it open to radical change or outright reversal, I argue instead that its revisability has directly contributed to a deeper, more lasting, and more legitimate set of institutions. As Habermas notes:

Without religious or metaphysical support, the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational *authors* of those norms.⁷⁴

And, indeed, these various human rights conventions and declarations have achieved the force of law, as embodied in a variety of regional courts and the newly established International Criminal Court.

Finally, the above quotation from Habermas brings us to a third important condition for consensus to achieve justificatory weight. In addition to its inclusive and participatory nature and its contingency and revisability, a consensus must also be achieved through a democratic and deliberative process. According to Habermas, “modern law lives off a solidarity concentrated in the value orientations of citizens and ultimately issuing from communicative action and deliberation.”⁷⁵ As discussed in detail above, the drafting and adoption of the Universal Declaration were quite clearly democratic and deliberative processes in which the participants carefully considered, discussed, and voted upon not only the language to employ in each of the Declaration’s thirty articles but also on the philosophical underpinnings of the document itself.⁷⁶ As Habermas points out:

the binding energies of language can be mobilized to coordinate action plans only if the participants suspend the objectivating attitude of an observer, along with the immediate orientation to personal success, in favor of the performative attitude of a speaker who wants to *reach an understanding* with a second person about something in the world.⁷⁷

And, indeed, one of the truly unique features of the consensus arrived at by the Commission is the record of discussion and deliberation of such a diverse group upon a wide range of opinion not only about the human good – about what enables us to flourish – but also about what brings us to grief.⁷⁸ The opening clauses of the Universal Declaration speak to this point, especially in recognizing that:

disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.⁷⁹

The limits of language

Having considered the necessary conditions under which consensus can have justificatory force, it is important to recognize that challenges remain. As Habermas asks:

how can disenchanted, internally differentiated and pluralized life-worlds be socially integrated if, at the same time, the risk of dissention is growing, particularly in the spheres of communicative action that

have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?⁸⁰

While I have argued that the process of drafting the Universal Declaration provides an answer to this question, it is important to recognize that controversy exists on whether discussion, deliberation, and consensus themselves can have any justificatory force or impel action. Habermas notes, on this point, that:

The ideal character of semantic generality shapes communicative action inasmuch as the participants could not even intend to reach an understanding with one another about something in the world if they did not *presuppose*, on the basis of a common (or translatable) language, that they conferred identical meanings on the expressions they employed. . . . The presupposition that linguistic expressions are used with identical meanings can often turn out to be false from an observer's perspective, and perhaps this is always the case under the ethnomethodologist's microscope.⁸¹

Put more simply, there are problems inherent in the use of language that can trip up even the best attempts to open dialogue and reach consensus. I can best make this point by returning to an example that Perry offers to highlight the weakness of Dworkin's theory of secular sacredness. Perry's challenge is to

Imagine someone saying to a Bosnian Serb: "The Bosnian Muslim, too, no less than you, is sacred. It is wrong for you to rape her." If "sacred" is meant in the subjective sense, the Bosnian Serb can reply: "Sacred to you and yours, perhaps, but not to me and mine. In the scheme of things, we happen not to attach much value to her life." By contrast, "sacred" in the objective sense is not fundamentally a matter of "sacred to you" or "sacred to me"; it is, rather, a matter of how things really are. . . . If every human being is sacred in the objective sense, then, in violating the Bosnian Muslim, the Bosnian Serb does not merely violate what some of us attach great value to; he violates the very order of creation.⁸²

Perry wants to give the Serb a reason why he ought not violate the Muslim. For both he and Dworkin, the reason is their belief that the Muslim is sacred; in this case, the reason is our belief that the Muslim is a bearer of human dignity. When further challenged and asked to provide a compelling reason for our belief, Perry would undoubtedly argue that its social construction hamstrings us. The larger challenge, however, is the one pointed out by Habermas, namely that we might be unable to speak with the Serb on this point at all. In this case – and in any situation where

human rights are under fire – we can respond by explaining that there is an international consensus about the ideas of human dignity and human rights. While this might not change the Serb’s mind – and, indeed, it might be the case that *nothing* will change the mind of a genocidal person – we can further note the existence of international human rights conventions and the emergence of the International Criminal Court, which now serve to back up our consensus. While this is certainly not the strong sort of theoretical defense that Perry desires, and while it does little more than sidestep Habermas’ concern about the limits of language, it is also not such a weak one. For, while Rorty points out that this truth, like any other, “is made rather than found,”⁸³ he also argues that the importance of its defense should shake us from our complacency and encourage us to offer compelling reasons for our holding it that stem from *our* having made it. In addition, and perhaps more practically, the consensus on at least a basic set of human rights enjoys widespread, if not universal, approval and the institutions that are extensions of that consensus have achieved the force of law.

Although there are clearly limits to the use of language that create some serious difficulties for the idea that the process of drafting the Universal Declaration can have justificatory force, I submit that it remains a strong beginning in responding to Perry. In addition, it also goes a long way toward fulfilling the conditions for a persuasive justification that I set out above: inclusivity, persuasiveness, and practicality. As discussed throughout this chapter, the drafting process was (and continues to be) a highly inclusive one. It is also, in my estimation, persuasive and its persuasiveness arises in no small part from its having met the conditions set out above for achieving justificatory force. Finally, the consensus on human rights and human dignity is sufficiently grounded in the real world to meet the condition of practicality; it is able to embrace many divergent viewpoints with a view toward involving the widest array of peoples in this vital discussion. And, indeed, Eleanor Roosevelt made this point herself about the substance of the consensus:

Now, I happen to believe that we are born free and equal in dignity and rights because there is a divine Creator, and there is a divine spark in men. But, there were other people around the table who wanted it expressed in such a way that they could think in their particular way about this question, and finally, these words were agreed upon because they . . . left it to each of us to put in our own reason, as we say, for that end.⁸⁴

The subtext of this statement also speaks to my point, for Roosevelt argues that this particular consensus, reached on such an important philosophical question as the nature of man, allows everyone to come to the table and discuss the idea of human rights regardless of *why* they hold this belief.

Rawls makes the same point, noting that “The idea of an overlapping consensus leaves this step to be taken by citizens individually in line with their own comprehensive views.”⁸⁵ The nations of the world may disagree on a great many things – philosophical as well as practical – but they have all agreed on this important point: every human being is entitled to the rights enshrined in the Universal Declaration by virtue of the inherent dignity that is common to us all.

This conclusion was also reached by Jacques Maritain and his colleagues on the UNESCO Committee, who noted that the cross-cultural agreement of the world’s leading men of letters was broad but shallow:

Maritain liked to tell the story of how a visitor at one meeting expressed astonishment that champions of violently opposed ideologies had been able to agree on a list of fundamental rights. The man was told: “Yes, we agree about the rights but on condition no one asks us why.”⁸⁶

On my reading, Maritain’s answer is a bit too self-effacing; the members of his committee were able to reach an agreement not only about the rights but also about human dignity, the reason why. Perhaps what Maritain meant to say was that everyone disagreed on the source of that dignity, on the reason behind the reason. Either way, we can learn much from Maritain and his overly modest comment, as well as his argument that

If there are some things so terrible in practice that virtually no one will publicly approve them, and some things so good in practice that virtually no one will oppose them, a common project can move forward without agreement on the reasons for those positions.⁸⁷

While we might not all agree on the reason behind the reason, at bottom, we have all agreed that human beings possess dignity and that, by virtue of this fact, they are inviolable; this idea can be embraced by those who subscribe to what Perry calls a religious cosmology and also by those who do not. In constructing this consensus, then, we have succeeded in establishing a practical non-religious foundation upon which the idea of human rights can rest.

Notes

Prologue: Starvin' for Justice

- 1 The Abolitionist Action Committee explains: "June 29 is the anniversary of the 1972 *Furman v. Georgia* decision in which the U.S. Supreme Court found the death penalty to be applied in an arbitrary and capricious manner. At that time, more than 600 condemned inmates had their death sentences reduced to terms of life imprisonment, and all states were forced to rewrite their death penalty laws. July 2 is the anniversary of the 1976 *Gregg v. Georgia* decision, which allowed executions to resume in the United States" based on the constitutionality of the states' new death penalty statutes (www.abolition.org/starvin13.FVhistory.html).
- 2 Consider the very different stories of two participants in the most recent Fast & Vigil, Bill Pelke and Juan Melendez. Pelke's seventy-eight-year-old grandmother Ruth was murdered by four ninth-grade girls she invited into her home for Bible lessons. One of the girls, Paula Cooper, was sentenced to death for the crime. She had been fifteen when the murder occurred, and at sixteen became the youngest female on death row in America. Originally supportive of Paula's death sentence, Bill eventually forgave Paula, began corresponding and visiting with her, and worked to overturn her sentence. She is now serving sixty years in prison (see Bill Pelke, *Journey of Hope . . . From Violence to Healing* (Philadelphia: Xlibris, 2003)). Second:

Juan Roberto Melendez Colon became the 24th person exonerated and released from Florida's death row when he was freed on January 3, 2002 after spending almost 18 years facing execution for a crime he had nothing to do with. Melendez was convicted in 1984 at the age of 33 with no physical evidence linking him to the crime and testimony from questionable witnesses. In fact, prosecutors hid evidence and lied to the court in order to protect the real killer, a police informant. Melendez's conviction fell apart when the police informant's confession came to light in 1999 – a confession that prosecutors knew about before they took Melendez to trial.

(www.journeyofhope.org/pages/juan_melendez.htm)

- 3 Abolitionist Action Committee website: www.abolition.org/starvin13fasting.html.
- 4 Ronald Dworkin, *Life's Dominion: an Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books, 1994), 4.
- 5 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 30–31.
- 6 *Ibid.*, 39–40, citation omitted.
- 7 For Alan M. Dershowitz, the question of whether or not it is permissible to

torture a captured terrorist seems not at all to turn on the relationship between men and God. In *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), he argues that a government wishing to protect its citizens from terror ought to consider the use of torture so long as enough information is known about the “ticking bomb suspect” so that a “torture warrant” can be obtained by the authorities (pp. 131–163). Apart from what are obvious problems of implementation that Der-showitz’s argument clearly raises, there exists a familiar philosophical dilemma in this “ticking bomb suspect” example whose origin is the scene in Fyodor Dostoevsky’s *The Brothers Karamazov* where Ivan tempts his virtuous brother, Alyosha, with the possibility of eternal happiness for all mankind at the cost of the torture and death of one innocent child. In an article in the *Guardian*, “Are there times when we have to accept torture?” (May 8, 2004), Ariel Dorfman comments on the torture of Iraqi prisoners by American and British soldiers, and reflects on Alyosha’s choice. His argument, which echoes much of what follows, notes that:

What Alyosha is telling Ivan, in the name of humanity, is that he will not accept responsibility for someone else torturing in his name. He is telling us that torture is not a crime committed only against a body, but also a crime committed against the imagination. It presupposes, it requires, it craves the abrogation of our capacity to imagine someone else’s suffering, to dehumanise him or her so much that their pain is not our pain. It demands this of the torturer, placing the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the same numbness, those who know and close their eyes, those who do not want to know and close their eyes, those who close their eyes and ears and hearts.

- 8 Amy Gutmann, “Introduction” in Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton University Press, 2001), xvii.
- 9 *Ibid.*

Introduction: the first day of class

- 1 In most cases, the obligation clearly lies with governments, but there are some human rights that are considerably less clear about where the duty lies. For example, Article Nine of the United Nations Universal Declaration of Human Rights in *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present*, ed. Micheline R. Ishay (New York: Routledge, 1997) – “No one shall be subjected to arbitrary arrest, detention or exile” (p. 409) – clearly implies an obligation on the part of national governments to refrain from arbitrarily arresting, detaining, or exiling their citizens. The same, however, cannot be said of Article Twenty-Eight – “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (*ibid.*, 411–412) – for it is not at all clear who is obliged to ensure that such a social and international order is established. Undoubtedly, we are all responsible for ensuring this right, but this makes a violation of such a right far more difficult to address.
- 2 William F. Schulz, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon Press, 2002), 24.
- 3 *Ibid.*, 18.

- 4 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 11–12.
- 5 As K. Anthony Appiah notes, in “Grounding Human Rights” in Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann. (Princeton: Princeton University Press, 2001): The wide diversity of people who call upon [human rights] includes . . . a substantial diversity of opinion on matters metaphysical – on religion in particular – and even if there is a single truth to be had about these matters, it is not one that we shall all come to soon (p. 105).
- 6 Perry, 15.
- 7 David DeGrazia, “Identity, Killing, and the Boundaries of Our Existence,” *Philosophy & Public Affairs* 31(4) (Fall 2003), 413.
- 8 Perry, 37.
- 9 *Ibid.*, 12.
- 10 Richard Rorty, *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge: Cambridge University Press, 1998), 184–185.

1 Michael Perry and the religious cosmology: foundations and critiques of human rights

- 1 United Nations Universal Declaration of Human Rights in *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present*, ed. Micheline R. Ishay (New York: Routledge, 1997), 407.
- 2 According to Burns H. Weston, in “Human Rights” in *The New Encyclopædia Britannica, Volume 20* (Chicago: Encyclopædia Britannica, 2002):

Most students of human rights trace the historical origins of the concept back to ancient Greece and Rome, where it was closely tied to the pre-modern natural law doctrines of Greek Stoicism (the school of philosophy founded by Zeno of Citium, which held that a universal working force pervades all creation and that human conduct therefore should be judged according to, and brought into harmony with, the law of nature).

(p. 656)

- 3 There are a wide variety of quotations from Eastern thinkers to support this point. Among my favorites are those pointed out by William F. Schulz in *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon Press, 2002), that “Confucius himself asserted that ‘an oppressive government is worse than a tiger’ ” (p. 183, citation omitted) and Mary Ann Glendon in *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), that:

The Bengali Muslim poet and philosopher Humayin Kabir sounded a universalist note in writing about human rights and the Islamic tradition. Kabir proudly recalled that early Islam had ‘succeeded in overcoming distinction of race and colour to an extent experienced neither before nor since.

(p. 74, citation omitted)

Of course, Schulz goes on to point out the so-called “Asian values” critique of human rights, “has a certain logical ring to it,” namely that:

to advance human rights around the globe is to try to impose American values on other people and hence should be avoided . . . Mao was raised

in the Chinese tradition. The Chinese tradition has no concept of human rights. To expect Mao to abide by them, therefore, is not only unfair but reflects an attempt to foist Western values on a different culture. The Chinese Communist Party may decree, as indeed it has, that Mao's merits outweigh his mistakes by a proportion of 7 to 3, but making judgments like that is not up to outsiders.

(p. 183)

While Schulz clearly disagrees with this sort of logic, Glendon offers a more powerful disagreement with those, like Singapore's Lee Kuan Yew, who argue that the idea of human rights is a Western construct that does not apply to Asian cultures:

The absence of formal declarations of rights in China, said Confucian philosopher Chung-Shu Lo, did not signify "that the Chinese never claimed human rights or enjoyed the basic rights of man." He explained: "[T]he problem of human rights was seldom discussed by Chinese thinkers of the past, at least in the same way as it was in the West. There was no open declaration of human rights in China, either by individual thinkers or by political constitutions, until this conception was introduced from the West [However], the idea of human rights developed very early in China, and the right of the people to revolt against oppressive rulers was very early established A great Confucianist, Mencius (372–289 B.C.), strongly maintained that a government should work for the will of the people. He said: "People are of primary importance. The State is of less importance. The sovereign is of least importance.

(pp. 73–74, citation omitted)

In addition, and perhaps even more pragmatic, are the words of Xiao Qiang, a Chinese dissident, at a 1998 Harvard symposium on the fiftieth anniversary of the Universal Declaration of Human Rights: "If you were to voice dissent from the prevailing view in China, you would end up in jail, and there you would soon be asking for your rights, without worrying about whether they were 'American' or 'Chinese'" (ibid., 232, citation omitted).

- 4 In the Confucian *Analects*, "Tse-kung asked, 'Is there one word that can serve as a principle of conduct for life?' Confucius replied, 'It is the word 'shu' – reciprocity. Do not impose on others what you yourself do not desire'" (15:23). The Islamic *Forty Hadiths of an-Nawawi* contends that "Not one of you is a believer until he desires for his brother what he desires for himself" (No. 13). In the *Mahabharata* of Hinduism, it is said, "Do naught to others which, if done to thee, would cause thee pain: this is the sum of duty" (5.1517). The Buddhist *Majjhima Nikaya* declares: "Is there a deed, Rahula, thou dost wish to do? Then bethink thee thus: Is this deed conducive to my own harm, or to others harm, or to that of both? Then is this a bad deed entailing suffering. Such a deed must thou surely not do" (1.415). This is by no means an exhaustive list, as it leaves out similar statements from Taoism, Sikhism, Shintoism, Zoroastrianism, and many others (see Ontario Consultants on Religious Tolerance: www.religioustolerance.org/reciproc.htm).
- 5 By way of an example, consider this passage about the freeing of slaves from Deuteronomy 15:12–15:

If a fellow Hebrew, a man or a woman, sells himself to you and serves you six years, in the seventh year you must let him go free. And when you release him, do not send him away empty-handed. Supply him liberally

from your flock, your threshing floor and your winepress. Give to him as the Lord your God has blessed you. Remember that you were slaves in Egypt and the Lord your God redeemed you. That is why I give you this command today.

(*The Holy Bible: New International Version*. Grand Rapids: Zondervan Publishing House, 1986, 142)

It is interesting to note, of course, that this commandment applies to Jewish slaves only, but more important for our present purpose is that there is no manner by which the slave can protest if his owner chooses to disobey God's commandment and keep him in bondage for more than seven years. Any violation of the commandment is between God and the slave-owner; the owner clearly has a duty (to God) to release the slave, but the slave seems not to have an explicit right to his freedom.

- 6 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 13, citations omitted.
- 7 *Ibid.*, 15.
- 8 *Ibid.*, 30–31.
- 9 *Ibid.*, 11.
- 10 *Ibid.*, citation omitted. This quotation, Perry tells us in his citation, is from a diary entry on August 11, 1913. It is of some interest to note another quotation from Tawney's diary that Perry includes in the citation, this one from three days earlier: "Unless a man believes in spiritual things – in God – altruism is absurd. What is the sense of it? Why shld [sic] a man recognize any obligation to his neighbor, unless he believes that he has been put in the world for a special purpose and has a special work to perform in it?" A great deal of recent work in the field of evolutionary psychology now stands against Tawney's invalidation of the idea of non-religious altruism. As early as 1976, in *The Selfish Gene* (New York: Oxford University Press, 1989), Richard Dawkins – very much *not* a religious thinker – suggested that:

A long memory and a capacity for individual recognition are well developed in man. We might therefore expect reciprocal altruism to have played an important part in human evolution. [Robert] Trivers goes so far as to suggest that many of our psychological characteristics – envy, guilt, gratitude, sympathy, etc. – have been shaped by natural selection for improved ability to cheat, to detect cheats, and to avoid being thought to be a cheat. . . . It is even possible that man's swollen brain, and his predisposition to reason mathematically, evolved as a mechanism of ever more devious cheating, and ever more penetrating detection of cheating in others.

(pp. 187–188)

Altruism, on this reading, has nothing at all to do with a belief in God; instead, the existence of altruistic behavior is explained through Darwinian natural selection. One acts altruistically not because one loves one's neighbors and values them as children of God, but because one's genes "know" the value of altruism, namely that one's neighbors will reciprocate in the future and that, therefore, everyone's altruistic genes will be passed on to the next generation. While this argument against Tawney's connection of altruism and religion does not necessarily invalidate his argument, three days later, about the connection between human rights and religion, it is interesting nonetheless.

- 11 Perry, 11.

- 12 Ibid., 39–40, citation omitted.
- 13 Ibid., 21. Perry also notes that differences exist within as well as across religious traditions, but that these differences “ought not to obscure the fact that the experience of all human beings as sacred is widely shared among different sects and religions” (Ibid.).
- 14 Perry, 17, citation omitted.
- 15 Michael J. Perry, “The Morality of Human Rights: a Nonreligious Ground?,” *Emory Law Journal* 54 (2005), 112.
- 16 Ibid., 112–113.
- 17 Raimond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (New York: Routledge, 2002), xxiii.
- 18 E-mail message from Michael J. Perry to Ari Kohen, April 28, 2003.
- 19 Perry, *Idea*, 19.
- 20 Ibid.
- 21 Perry, “Morality,” 115.
- 22 Ibid., 115–117, citations omitted.
- 23 Ibid., 116n.
- 24 Harry G. Frankfurt, “Freedom of the Will and the Concept of a Person,” *Journal of Philosophy* 68(1) (January 14, 1971), 7.
- 25 Ibid.
- 26 Perry, *Idea*, 19, citation omitted.
- 27 Matthew 25:31–46 in *The Holy Bible*, 739. Perry quotes a slightly different translation of the same passage in *Idea*, 20, but the ideas expressed are identical.
- 28 Perry, *Idea*, 20–21.
- 29 Ibid., 21–22.
- 30 In what follows, I will consider some problems that exist for the idea of human rights in Judaism and Christianity, as they are the two religious traditions with which I am most familiar. This should *not* be read as a condemnation of these traditions nor as an affirmation of other traditions – Islam, Buddhism, or Hinduism, for example – that I do not consider.
- 31 Genesis 6:11–13 in *The Pentateuch and Haftorahs*, ed. J.H. Hertz (London: Soncino Press, 1993), 26.
- 32 There are a number of other stories of murder and destruction from Genesis, ranging from the very well-known to the obscure. The most famous is undoubtedly the wholesale extermination of Sodom and Gomorrah (“Then the Lord caused to rain upon Sodom and upon Gomorrah brimstone and fire from the Lord out of heaven; and he overthrew those cities, and all the Plain, and all the inhabitants of the cities and that which grew upon the ground” (19:24–25 in Ibid., 68)). Perhaps the least famous, but a personal favorite, is the triumphal ode to violence ascribed to Lamech, to whom rabbinic commentary gives the dubious distinction of killing Cain (“And Lamech said unto his wives: Adah and Zillah, hear my voice; Ye wives of Lamech, hearken unto my speech; For I have slain a man for wounding me, And a young man for bruising me; If Cain shall be avenged sevenfold, Truly Lamech seventy and sevenfold” (4:23–24 in Ibid., 16)).
- 33 Genesis 22:10–12 in Ibid., 75.
- 34 I Samuel 15:2–33 in Ibid., 996–998.
- 35 Ibid., 995.
- 36 Ibid.
- 37 Perry, *Idea*, 31.
- 38 To cite just two examples, first Jesus famously prevents the stoning death of a woman brought before him:

At dawn he appeared again in the temple courts, where all the people gathered around him, and he sat down to teach them. The teachers of the law and the Pharisees brought in a woman caught in adultery. They made her stand before the group and said to Jesus, "Teacher, this woman was caught in the act of adultery. In the Law Moses commanded us to stone such women. Now what do you say?" When they kept on questioning him, he straightened up and said to them, "If any one of you is without sin, let him be the first to throw a stone at her."

(John 8:2–7 in *The Holy Bible*, 796)

Second, and perhaps more famously, Judas receives thirty pieces of silver for his part in the arrest and eventual execution of Jesus:

Then one of the Twelve – the one called Judas Iscariot – went to the chief priests and asked, 'What are you willing to give me if I hand him over to you?' So they counted out for him thirty silver coins. From then on Judas watched for an opportunity to hand him over.

(Matthew 26:14–16 in *ibid.*, 740)

- 39 William Edward Hartpole Lecky, *History of European Morals From Augustus to Charlemagne* (New York: George Braziller, 1955), ii, 195–196, citations omitted.
- 40 William Schulz provides just such an example of minor differences within a singular religious tradition in *Tainted Legacy: 9/11 and the Ruin of Human Rights* (New York: Nation Books, 2003):

One of the factions in the early Christian Church, followers of the charismatic preacher Montanus, believed that only those who ate a steady diet of radishes would be saved. The women in the community, who played an inordinately powerful role in the life of the movement, especially promoted this healthy regimen. Had Montanism prevailed, Christians might eat vegetables at Holy Communion rather than wafers, and the Roman Catholic church might suffer today no shortage of priests.

(p. 109)

Rather than prevailing, however, the Montanists were condemned as heretics, their churches were destroyed, and the movement sharply declined into obscurity.

- 41 Karen Armstrong, *Holy War: the Crusades and Their Impact on Today's World* (New York: Doubleday, 1991), 178–179.
- 42 Aleksandr I. Solzhenitsyn, *The Gulag Archipelago 1918–1956: an Experiment in Literary Investigation, Parts I–II* trans. Thomas P. Whitney (New York: Harper & Row, 1974), 173–174.
- 43 Raymond Aron, *The Opium of the Intellectuals* (New Brunswick: Transaction Publishers, 2001), 323.
- 44 Perry, *Idea*, 14. Interestingly, Perry's citation of Heschel on this point also includes a similar quotation taken from Dostoevsky's *The Brothers Karamazov*:

For the secret of man's being is not only to live but to have something to live for. Without a stable conception of the object of life, man would not consent to go on living, and would rather destroy himself than remain on earth, though he had bread in abundance.

As Perry notes, this is one of the Grand Inquisitor's statements.

- 45 Aron, 323.
- 46 Perry, *Idea*, 22, citation omitted.
- 47 Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1971), 42–43.
- 48 Perry, *Idea*, 14.
- 49 Ibid.
- 50 Ibid., 14–15.
- 51 Ibid., 15.
- 52 Ibid.
- 53 Aron, 84–85.
- 54 Karen Armstrong, *A History of God: The 4,000-Year Quest of Judaism, Christianity and Islam* (New York: Ballantine Books, 1993), 354.
- 55 Ibid.
- 56 Karl Marx, *Economic and Philosophic Manuscripts of 1844* in *The Marx–Engels Reader*, ed. Robert C. Tucker (New York: W.W. Norton & Company, 1978), 84.
- 57 Armstrong, *History of God*, 83–84.
- 58 Ibid., 129.
- 59 Ibid.
- 60 Perry, *Idea*, 16.
- 61 Martin Heidegger, *An Introduction to Metaphysics*, trans. Ralph Manheim (New Haven: Yale University Press, 1987), 1–2.
- 62 Martin Heidegger, *Nietzsche, Volume IV: Nihilism*, trans. Frank A. Capuzzi in *Nietzsche, Volumes Three and Four* ed. David Farrell Krell (New York: HarperCollins Publishers, 1991), 22.
- 63 Ibid., 162–164, 168–172.
- 64 Friedrich Nietzsche, *The Gay Science* in *The Portable Nietzsche*, ed. and trans. Walter Kaufmann (New York: Penguin Books, 1982), 95.
- 65 Heidegger, *Nietzsche*, 203.
- 66 Ibid., 19.
- 67 Perry, *Idea*, 16.
- 68 Friedrich Nietzsche, *The Will to Power*, trans. Walter Kaufmann and R.J. Hollingdale, and ed. Walter Kaufmann (New York: Vintage Books, 1968), 142.
- 69 Perry, *Idea*, 24, citation omitted.
- 70 Samantha Power, “*A Problem from Hell*”: *America and the Age of Genocide* (New York: Perennial, 2003), 196–197.
- 71 Perry, *Idea*, 17, citation omitted.
- 72 Ibid., 19, citation omitted.
- 73 Walter Kaufmann, “Editor’s Introduction” in Nietzsche, *Will to Power*, xv–xvi.
- 74 Friedrich Nietzsche, *On the Advantage and Disadvantage of History for Life*, trans. Peter Preuss (Indianapolis: Hackett Publishing Company, 1980), 18.
- 75 Ibid., 20.
- 76 Ibid., 10.
- 77 Ibid.
- 78 Ibid., 30.
- 79 Friedrich Nietzsche, *On the Genealogy of Morals: a Polemic in Basic Writings*, 485, citation omitted. In his footnote, Kaufmann translates the Latin: “The blessed in the kingdom of heaven will see the punishments of the damned, *in order that their bliss be more delightful for them.*” He notes, also, that this is not quite what one finds in Aquinas’ *Summa Theologiae*; to be exact, Aquinas writes, “*Ut beatitudo sanctorum eis magis complaceat, et de ea uberiores*

gratias Deo agant, datur eis ut poenam impiorum perfecte intueantur.” In English: “In order that the bliss of the saints may be more delightful for them and that they may render more copious thanks to God for it, it is given to them to see perfectly the punishment of the damned.” While the original differs from Nietzsche’s rendering of it, the spirit is clearly unchanged. The lengthy quotation that Nietzsche employs following Aquinas, while also in Latin, is even more faithful to its author, Tertullian. Here is a short sample, in English:

Yes, and there are other sights: that last day of judgment, with its everlasting issues; that day unlooked for by the nations, the theme of their derision, when the world hoary with age, and all its many products, shall be consumed in one great flame! How vast a spectacle then bursts upon the eye! *What there excites my admiration? What my derision? Which sights gives me joy? Which rouses me to exultation?* – as I see so many illustrious monarchs, whose reception into the heavens was publicly announced, groaning now in the lowest darkness with great Jove himself, and those, too, who bore witness of their exultation; governors of provinces, too, who persecuted the Christian name, in fires more fierce than those with which in the days of their pride they raged against the followers of Christ.

- 80 Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future* in *Basic Writings*, 251.
- 81 *Ibid.*, 393.
- 82 *Ibid.*, 395.
- 83 *Ibid.*, 243.
- 84 *Ibid.*
- 85 Friedrich Nietzsche, *The Birth of Tragedy: Out of the Spirit of Music* in *Basic Writings of Nietzsche*, ed. and trans. Walter Kaufmann (New York: The Modern Library, 1992), 42.
- 86 Nietzsche, *Beyond Good and Evil*, 416.
- 87 Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 89.
- 88 Werner J. Dannhauser, “Friedrich Nietzsche” in *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey (Chicago: University of Chicago Press, 1987), 848–849.
- 89 *Ibid.*, 849.
- 90 *Ibid.*
- 91 Perry, *Idea*, 13, citations omitted.

2 The possibility of non-religious human rights: Alan Gewirth and the Principle of Generic Consistency

- 1 Aleksandr I. Solzhenitsyn, *The Gulag Archipelago 1918–1956: an Experiment in Literary Investigation, Parts I–II*, trans. Thomas P. Whitney (New York: Harper & Row, 1974), 168.
- 2 Primo Levi, *The Drowned and the Saved*, trans. Raymond Rosenthal (New York: Vintage International, 1989), 48–49.
- 3 Jonathan Glover, *Humanity: a Moral History of the Twentieth Century* (New Haven: Yale University Press, 2001), 401.
- 4 *Ibid.*, 406.
- 5 Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1981), ix.

- 6 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 13, citations omitted.
- 7 Alan Gewirth, "The Epistemology of Human Rights," 1 *Social Philosophy & Policy* 1(2) (Spring 1984), 14–17.
- 8 *Ibid.*, 18.
- 9 *Ibid.*
- 10 *Ibid.*, 5, citations omitted.
- 11 *Ibid.* While Gewirth is correct in arguing that it is insufficient to simply assert that individuals have rights and expect those rights to be respected, he is wrong to think that he has properly dismissed Nozick's claim. In fact, Nozick spends a good deal more time on the question of the origin of rights than Gewirth seems to recognize. While it is correct to say that Nozick does not provide a complete argument, closing instead with a lengthy series of questions, he certainly goes beyond peremptory assertion on this point. For Nozick's discussion of the source of our rights and his grappling with the question of how the meaning we give our lives might provide such an origin, see his *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 48–51.
- 12 Gewirth, "Epistemology," 6.
- 13 *Ibid.*
- 14 *Ibid.*
- 15 This critique of Feinberg is one that should not be presented as free from difficulty, as Gewirth seems not to be engaging with Feinberg's core argument about rights in "The Nature and Value of Rights." Instead, he quotes from the next essay, "The Rights of Animals and Unborn Generations." While the latter deals with interests, the former contains a detailed discussion of the origin of rights that focuses on the importance of claiming them rather than their derivation from our having interests:

Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons . . . may simply be respect for their rights, so that there cannot be the one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims.

(Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980), 151)

- 16 Gewirth, "Epistemology," 6, citation omitted.
- 17 *Ibid.*, 7, citation omitted.
- 18 *Ibid.*, 8, citation omitted.
- 19 *Ibid.*, 8–9.
- 20 *Ibid.*, 9, citation omitted. For Rawls' formulation of the original position and veil of ignorance, see his *A Theory of Justice*, Revised Edition (Cambridge: The Belknap Press of Harvard University Press, 1999), 15–19, 109–112, and 118–123.
- 21 Gewirth, "Epistemology," 9. The argument employed by Gewirth against Rawls is somewhat problematic for at least two reasons. The first is that Rawls, clearly, does not imagine the original position to be the truth about the world; it is, instead, a thought experiment that Rawls employs in an

attempt to derive a version of justice that would be justifiable to all from very modest premises. The second problem for Gewirth is that, in all that follows, he does something very similar to Rawls in constructing his own argument about the generic rights of prospective purposive agents.

22 Ibid.

23 Ibid., 10.

24 Ibid.

25 Gewirth, *Reason*, 7.

26 Ibid., 25.

27 Perry, 13, citation omitted.

28 Gewirth, "Epistemology," 3.

29 Gewirth, *Reason*, 25–26.

30 Ibid., 27.

31 Ibid., 37. This argument against determinism might not pass muster with thoughtful contemporary determinists, who could argue that being the sort of person who can "reflectively consider various reasons for alternative actions and choose among them on the basis of such consideration" is itself determined by a host of factors over which one has no control.

32 Ibid., 39, citation omitted.

33 Ibid., 40.

34 Gewirth, "Epistemology," 14–15.

35 Ibid., 15.

36 Ibid.

37 Ibid.

38 Gewirth, *Reason*, 65.

39 Gewirth, "Epistemology," 15.

40 Gewirth, *Reason*, 59–60.

41 Gewirth, "Epistemology," 15.

42 Ibid.

43 Gewirth, *Reason*, 63.

44 Ibid., 66.

45 Gewirth, "Epistemology," 15.

46 Ibid.

47 Ibid., 16.

48 Ibid.

49 This point raises the issue of criminal justice, as punishing a criminal obviously interferes with his freedom and well-being. On this point, Gewirth argues that punishment acts as a mechanism for restoring the equality of freedom and well-being that exists between agents: "If the agent inflicts a basic or other serious harm on some recipient, he violates this equality in a quite specific way, and the punishment prescribed by the criminal law is justified as a way of restoring the equality by redressing the previously disturbed balance" (*Reason*, 297). By way of example, he considers the case of A and B, and the problem that arises when A harms B: "A not only removes X units from B; he also adds a comparable number of units to his own stock of well-being. . . . The punishment prescribed by the criminal law, in accordance with the Principle of Proportionality, removes from A this additional satisfaction" (ibid.). This is, of course, quite different from the Kantian argument about punishment in *The Metaphysics of Morals*, namely that:

Judicial punishment can never be merely a means of furthering some extraneous good for the criminal himself or for civil society, but must always be imposed on the criminal simply *because he has committed a crime*. For a

human being can never be manipulated just as a means of realising someone else's intentions, and is not to be confused with the objects of the law of kind. He is protected against this by his inherent personality, although he may well be sentenced to forfeit his civil personality.

(In Immanuel Kant, *Political Writings*, ed. Hans Reiss and trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1996), 154–155)

- 50 Gewirth, "Epistemology," 16.
 51 Gewirth, *Reason*, 64.
 52 Gewirth, "Epistemology," 16.
 53 Perry, *Idea*, 30–31.
 54 Gewirth, *Reason*, 104.
 55 *Ibid.*, 104–105.
 56 Gewirth, "Epistemology," 16.
 57 Gewirth, *Reason*, 111–112.
 58 *Ibid.*, 112.
 59 *Ibid.*, 110.
 60 Gewirth, "Epistemology," 16–17.
 61 *Ibid.*, 17.
 62 Gewirth, *Reason*, 112.
 63 Gewirth, "Epistemology," 17.
 64 *Ibid.*
 65 *Ibid.* For a great deal more discussion of the PGC, including its derivation, its formal necessity, and a number of objections and responses, see Gewirth, *Reason*, 129–198. Some of these points will also be discussed in the third section of this chapter. For a shorter restatement of the PGC, see Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), 13–30; the remainder of that book concerns itself with applying the PGC to the idea of social solidarity or community, arguing that rights to freedom and well-being "are also positive, in that in certain circumstances they require active assistance whereby one helps other persons to have freedom and well-being" (p. 31). Beyond Gewirth's own writings on the PGC, Deryck Beyleveld has undertaken two painstakingly detailed summaries of the PGC in *The Dialectical Necessity of Morality: an Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (Chicago: University of Chicago Press, 1991). Beyleveld also examines more than sixty objections to Gewirth's argument (from the publication of Gewirth's *Reason and Morality* in 1978 to 1989, when Beyleveld prepared his own manuscript for publication) and I will turn to his exhaustive defense of the PGC in the third section of this chapter.
 66 In a series of footnotes to his introduction, Beyleveld provides a comprehensive list of the arguments to which he responds in his book and to which Gewirth has already responded (p. 398–400). He also notes:

I cannot, of course, guarantee that I have located all items. . . . If I have overlooked items, then these are most likely to be reviews, comments in books, comments in articles that are not specifically on Gewirth, or articles in foreign languages. After February 1990, I did not attempt to locate further items.

(p. 400)

Although Beyleveld's catalog of critiques is now sixteen years old, I have chosen not to conduct my own search for more recent arguments against the

PGC because I am confident that those included in Beyleveld's book offer a complete picture of the problems theorists have identified with Gewirth's theory. A quick search reveals, for example, a 1992 article by Louis P. Pojman that includes a short critique of Gewirth, but it seems to me to have been dealt with by Gewirth himself as early as his first articulation of the theory in *Reason and Morality* and again by Beyleveld. In "Are Human Rights Based on Equal Human Worth?," *Philosophy and Phenomenological Research* 52(3) (September 1992), Pojman offers this critique:

I don't see why the PGC doesn't apply to animals as well as humans, thus making them equal recipients of our attention. Cats and rats implicitly act on the principles of needing freedom and well-being, even if they cannot articulate them or bring them consciously to mind.

(pp. 616–617)

Gewirth, though, tells us in his first explication of his theory why the PGC doesn't apply to animals:

it must be noted that not all entities that pursue or seem to pursue purposes are agents in the sense used here. Animals other than humans lack for the most part the ability to control their behavior by their unforced choice, to have knowledge of relevant circumstances beyond what is present to immediate awareness, and especially to reflect rationally on their purposes.

(*Reason*, 120)

67 Beyleveld, 402.

68 Gewirth, *Reason*, 46.

69 Malcolm Bowie, *Lacan* (Cambridge: Harvard University Press, 1991), 10.

70 *Ibid.*, 15–16.

71 Lacan's attempt to offer a solution to his own nihilistic conclusion is based on the idea of self-knowledge, which he argues can be attained by acquiring a certain level of understanding of Lacanian theory and submitting to psychoanalysis. Crucial to the notion of self-knowledge, however, is that its acquisition does not leave an agent with the same ends he had prior to its acquisition. In other words, what the agent thought he was aiming at turns out not at all to be what he truly had as an end. In this way, self-knowledge cannot be seen as a goal on the path to achieving one's ends. Rather than hoping to make better decisions or find out an ultimate end, Lacan seems only to suggest that arriving at the truth about ourselves will – in some way – help us to understand the various conflicts that arise in our lives. He does not even go so far as to put forward the idea that self-knowledge will necessarily help us in our effort not to run afoul of them. For more on this important point, see Jacques Lacan, *The Seminar of Jacques Lacan: Book VII, The Ethics of Psychoanalysis 1959–1960*, ed. Jacques-Alain Miller and trans. Dennis Porter (New York: W.W. Norton & Company, 1997), 291–301. See also, Bowie, 197–203.

72 Gewirth, *Reason*, 106.

73 Beyleveld, 243, citation omitted.

74 *Ibid.* For Gewirth's own, very thorough account of the criterion of relevant similarities, see *Reason*, 104–128.

75 Beyleveld, 247.

76 *Ibid.*, 248.

- 77 Gewirth, *Reason*, 122.
- 78 Ibid.
- 79 Beyleveld, 447.
- 80 Ibid., 448. Beyleveld and Shaun Pattinson return to this problem in “Precautionary Reason as a Link to Moral Action” in *Medical Ethics*, ed. Michael Boylan (Upper Saddle River: Prentice Hall, 2000) and their conclusion is essentially that we ought to assume human beings are PPAs (pp. 43–45). Failure to do so, they argue, might lead us to violate an agent’s rights and precautionary reasoning dictates that we should err on the side of caution in these cases: “even where an other being is apparently only a partial agent there remains a risk that – if I suppose that it is not an agent, and act accordingly – it is an agent, and I will have deprived it of the protection of the Principle of Generic Consistency to which it is entitled” (ibid., 43). This is all well and good as long as we are uncomfortable taking these risks with possible PPAs and, Beyleveld and Pattinson point out, as long as we have some reason to believe that these beings might be agents in the fullest sense. When it comes to those who are obviously partial agents – and to those who are possibly partial agents – another problem arises. As Beyleveld and Pattinson note, “the moral status of beings who are more probably agents is greater than that of beings who are less probably agents. In other words, the moral status of beings is *proportional* to the probability that they are agents” (p. 44). The only duties that Beyleveld and Pattinson recognize as being owed to partial agents “are unavoidably paternalistic” and even the duty not to harm the partial agent can be overcome if failing to observe that duty allows us to observe a duty to an agent or a being suspected of greater agency than the partial agent (ibid.).
- 81 Richard Rorty, *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge: Cambridge University Press, 1998), 178.
- 82 Ibid., 178–179.
- 83 Gewirth, *Reason*, 122.
- 84 Rorty, 177, citation omitted.
- 85 Ibid.
- 86 Ibid., 178.
- 87 Friedrich Engels, *Anti-Dühring: Herr Eugen Dühring’s Revolution in Science* (New York: International Publishers, 1966), 108–109. Gewirth’s quotation of Engels can be found in *Reason*, 127–128; another copy of the quotation and a defense of Gewirth on this point can be found in Beyleveld, 309–310.
- 88 Gewirth, *Reason*, 128.
- 89 Ibid.
- 90 Beyleveld, 310.
- 91 Ibid.
- 92 Virginia Held, “Reason and Economic Justice” in *Economic Justice: Private Rights and Public Responsibilities* ed. Kenneth Kipnis and Diana T. Meyers (Totowa: Rowman and Allanheld, 1985), 38. The quotation can also be found in Beyleveld, 311.
- 93 Beyleveld, 314–315.
- 94 Ibid., 314.
- 95 Beyleveld and Pattinson point out that they “use ‘it’ to avoid implying that all agents are human or are necessarily gendered” (p. 41n). While there is likely some value in avoiding this assumption about agents, I want to argue that a discussion of rights loses a great deal of its precision and force when it achieves this degree of abstraction.
- 96 Gewirth, *Reason*, 128.

- 97 Michael Sandel, *Liberalism and the Limits of Justice*, Second Edition (Cambridge: Cambridge University Press, 1998), 179.
- 98 Ibid.
- 99 Arthur Koestler, *The Yogi and the Commissar: and Other Essays* (New York: The Macmillan Company: 1946), 91.
- 100 Samantha Power, "A Problem from Hell": *America and the Age of Genocide* (New York: Perennial, 2003), 349. In addition to its frank discussion of Rwanda, Power's book looks closely at the genocidal campaigns carried out in the twentieth century in Turkey, Germany, Cambodia, Iraq, and Bosnia. Each chapter is well-stocked with stories about violence as gruesome as this one, as is the entirety of Philip Gourevitch's account of the Rwandan genocide, *We Wish to Inform You That Tomorrow we Will be Killed with our Families: Stories from Rwanda* (New York: Picador USA, 1998). It is possible, quite literally, to open Gourevitch's book to any page and find descriptions of violence the likes of which are unknown to Western readers and seem too horrible to be true. Power offers an interesting quotation to this effect in her discussion of Bosnia:

"They were talking about women being put in rape camps. They were talking about all these killings – some they said they'd seen, others they'd only heard about. They talked about people being thrown off cliffs, men being held and tortured and starved in camps. . . . No matter how much I heard, I just found it hard to believe. I couldn't believe. In fact, I didn't believe.

(p. 270)

- 101 Gewirth, *Reason*, 213.
- 102 William F. Schulz, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon Press, 2002), 23.
- 103 Ibid., 25.

3 The problem of secular sacredness: Ronald Dworkin, Michael Perry, and human rights foundationalism

- 1 Hobbes says, in *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), "the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself" (p. 87).
- 2 Steven Pinker, *The Blank Slate: the Modern Denial of Human Nature* (New York: Viking, 2002), 56, citation omitted.
- 3 Ibid., 58, citation omitted.
- 4 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 24, citation omitted. As the first chapter made clear, Perry's understanding of a meaningful universe is quite distinct: it is one that is "hospitable to our deepest yearnings for what [Abraham] Heschel called 'ultimate relationship, ultimate belonging'" (ibid., citation omitted). For Pinker, of course, the world might very well be meaningless in the sense that Perry has in mind, but it is not necessarily absurd. If we were to consider the world from the point of view of our genes, the future has quite a long shadow indeed, far longer than the span of any one individual life. That said, Pinker would likely dispute the use of words like meaningless and absurd to describe the world and our place in it. Simply because human beings are, in a sense, well-oiled machines whose function is to deliver their genes into the next generation does

not entail that their existence is absurd or meaningless. We are quite capable of making plans, forming attachments, and living full lives – and these are no less real if our purpose for doing them is to propel our genetic material into the future.

- 5 Ronald Dworkin, *Life's Dominion: an Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books, 1994), 195.
- 6 *Ibid.*, 79.
- 7 *Ibid.*, 155.
- 8 I will alternate between “human being” and “human life” throughout this chapter, as Perry writes of the former and Dworkin the latter. While I recognize that these terms are charged, particularly within the literature on reproductive rights, I will not take a position on whether the concept of sacredness best applies to one or the other. It seems sufficient to note, for the purposes of this chapter, that it does not seem odd to refer to either the sacredness of all human life or every human being. It might, however, be a bit of a stretch to refer to the inherent dignity of all human life, as opposed to every human being, for reasons which will be discussed in greater length later in this chapter and the next.
- 9 Dworkin, 68–69.
- 10 *Ibid.*, 69, italics mine.
- 11 *Ibid.*, 71.
- 12 *Ibid.*
- 13 *Ibid.*, 70.
- 14 *Ibid.*, 74.
- 15 There are, however, some things that tend to blur the distinction for Dworkin. While art is intrinsically valuable, *great* art is sacred and might also – on occasion – be incrementally valuable. The same, he suggests, might be true of great lives: “even those who are most in favor of controlling population growth would not want fewer Leonardo da Vincis or Martin Luther Kings” (p. 74). It seems, though, that the question of incremental value is ultimately a personal one; as Dworkin tells us, “I do not myself wish that there were more paintings by Tintoretto than there are. But I would nevertheless be appalled by the deliberate destruction of even one of those he did paint” (p. 74). It is not terribly difficult to imagine someone who yearned for more Tintorettoes and fewer da Vincis, and it is not immediately obvious from Dworkin’s argument how this dispute might be adjudicated.
- 16 Perry, 26.
- 17 *Ibid.*
- 18 *Ibid.*
- 19 Dworkin, 71.
- 20 *Ibid.*, 69.
- 21 Michael J. Perry, “The Gospel According to Dworkin,” *Constitutional Commentary* 11(1) (Winter 1994), 178n.
- 22 Dworkin, 69.
- 23 Ronald Dworkin, “Life is Sacred. That’s the Easy Part,” *The New York Times Magazine* (May 16, 1993), 36.
- 24 Perry, *Idea*, 26.
- 25 *Ibid.*
- 26 Dworkin, *Life's Dominion*, 74.
- 27 *Ibid.*
- 28 As John Tomasi correctly notes, in “Liberalism, Sanctity, and the Prohibition of Abortion,” *Journal of Philosophy* 94(10) (October 1997), “The crucial move, according to Dworkin, is to think of the creative inputs in people’s lives,

whether from nature (natural selection or, on some views, God's work) or from humans (culture and training), not simply as contributions but as *investments*" (p. 493). We can clearly understand what the investment is toward when considering a purely human investment, but it is considerably murkier with natural investments. The puzzle is that, despite this difficulty, most people seem quite confident about whether or not their actions are respectful of natural investment:

When human projects, directly or indirectly, threaten an entire species of animal (consider the ivory hunting of the African elephant, or the eradication of the snail darter by the Tellico Dam) most people are quite sure that this is a terrible thing, an act of desecration.

(Ibid., 495)

The puzzle is solved by what Tomasi terms the investment connection (IC) and, specifically, by the notion that IC is severed by what he calls a *crossbasal violation* when one closes an investment account opened by someone else. To flesh this idea out somewhat, consider the following example:

When a species of tree or animal naturally goes extinct, there seems to be a great subtraction of nature's creative investment. Yet people do not feel here . . . that such an event is a violation of the sacred. . . . Since nature (theistic/secular) opened the account embodied in the tree species, when nature closes the account, IC has been preserved. . . . Imagine a different case whereby a community of young lumberjacks had developed a (to them) richly rewarding and meaningful life project centrally committed to the project of efficiently cutting down trees. Unfortunately, the remaining stand of some . . . tree species gets in their way and is destroyed. . . . In both cases, the eradication of an entire tree species involves a great subtraction from what is wonderful in the world. . . . But, faced with uncertainty about what nature intends . . . people feel the loss in the lumberjack case is worse because of the way the loss comes about: that loss involves what we might call a *sacred violation*.

(Ibid., 497–498)

Despite all of this talk about avoiding sacred violations, Tomasi might not be entirely correct, as two important examples help to highlight. While it is true that most people worry about the extinction of beautiful, exotic, or helpful animals, the same cannot be said about the possibility of killing off nature's peskier creations. For example, mosquitoes are deliberately destroyed every minute of every day, and people do not so much as pause to consider that these creatures are a product of a great deal of natural investment. Mosquitoes are not on the verge of extinction, of course, but I am not confident that our decision to slap at them would change a great deal if they were. Similarly, few homeowners would be terribly upset if mankind found a way to exterminate crabgrass from the face of the planet. The distinctly human project of cultivating attractive lawns, especially when it involves strong chemicals to destroy weeds, is clearly disrespectful of nature's creative investment in crabgrass. These two examples call attention to the fact that not all of Tomasi's sacred violations are extremely troubling to most people; in fact, most people seem not to be concerned in the least about *these* sorts of crossbasal violations. Few people, if any, would suggest that human beings and mosquitoes represent equivalent creative investments, of course, which might account for

the confidence that Dworkin has in our ability to figure out how much respect we owe to each.

29 Dworkin, *Life's Dominion*, 76.

30 *Ibid.*, 82.

31 *Ibid.*, 83.

32 *Ibid.*

33 Perry, *Idea*, 27.

34 There are, of course, other ways of in which people are awestruck that have no connection at all to sacredness. It is entirely possible for one to be filled with awe and find no value at all in the awesome object or event. Consider this famous description from Niccolò Machiavelli, *The Prince*, trans. Harvey C. Mansfield, Jr. (Chicago: University of Chicago Press, 1985):

And because this point is deserving of notice and of being imitated by others, I do not want to leave it out. Once the duke had taken over Romagna, he found it had been commanded by impotent lords who had been readier to despoil their subjects than to correct them. . . . So he put there Messer Remirro de Orco, a cruel and ready man, to whom he gave the fullest power. In a short time Remirro reduced it to peace and unity, with the very greatest reputation for himself. Then the duke judged that such excessive authority was not necessary. . . . And because he knew that past rigors had generated some hatred for Remirro, to purge the spirits of that people and to gain them entirely to himself, he wished to show that if any cruelty had been committed, this had not come from him but from the harsh nature of his minister. And having seized this opportunity, he had him placed one morning in the piazza at Cesena in two pieces, with a piece of wood and a bloody knife beside him. The ferocity of this spectacle left the people at once satisfied and stupefied.

(pp. 29–30, citation omitted)

35 Perry, *Idea*, 28.

36 *Ibid.*

37 At times, Dworkin seems uncertain as to his *own* position on whether something can possess value independently of anyone valuing it:

I do not mean to take any position on a further, very abstract philosophical issue not pertinent to this discussion: whether great paintings would still be valuable if intelligent life were altogether destroyed forever so that no one could ever have the experience of regarding paintings again. There is no inconsistency in denying that they would have value then, because the value of a painting lies in the kind of experience it makes available, while still insisting that this value is intrinsic because it does not depend on any creatures' actually wanting that kind of experience.

(*Life's Dominion*, 248n)

38 Christopher J. Eberle, "Unnatural Sacrifice" (unpublished manuscript, 2003), 4, citation omitted.

39 Michael J. Perry, "The Morality of Human Rights: a Nonreligious Ground?," *Emory Law Journal* 54 (2005), 112–113.

40 *Ibid.*, 141.

41 Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis: Hackett Publishing Company, 1993), 61–62.

42 Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1968), 85.

- 43 E-mail message from Michael J. Perry to Ari Kohen, May 12, 2003.
- 44 Jeffrie G. Murphy, "Afterword: Constitutionalism, Moral Skepticism, and Religious Belief" in *Constitutionalism: The Philosophical Dimension*, ed. Alan S. Rosenbaum (New York: Greenwood Press, 1988), 247–248.
- 45 Perry, "Morality," 141–142, citations omitted.
- 46 *Ibid.*, 140.
- 47 E-mail message from Michael J. Perry to Ari Kohen, May 12, 2003.
- 48 Perry, *Idea*, 28.
- 49 *Ibid.*, 29.
- 50 Dworkin, *Life's Dominion*, 73.
- 51 Perry, *Idea*, 28.
- 52 *Ibid.*, 28, italics mine.
- 53 *Ibid.*, 12.
- 54 *Ibid.*, 30–31.
- 55 *Ibid.*, 13, citation omitted.
- 56 *Ibid.*, 31, citation omitted.
- 57 *Ibid.*, 30, citation omitted.
- 58 Robert Grant, "Abortion and the Idea of the Sacred," *Times Literary Supplement* (June 18, 1993), 11.
- 59 Dworkin, *Life's Dominion*, 84.
- 60 The next two chapters will examine the concept of self-creation in greater detail and I will argue for its centrality to non-religious understandings of human dignity and human rights. Richard Rorty, the subject of the penultimate chapter, offers what is, in my mind, a more complete – or more robust – discussion of the self-creation that human beings undertake than Dworkin does.
- 61 Perry, *Idea*, 13, citations omitted.
- 62 *Ibid.*, 60.
- 63 *Ibid.*, 12.
- 64 Perry, *Idea*, 13, citations omitted.
- 65 Murphy, 245.
- 66 Raimond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (New York: Routledge, 2002), 23.
- 67 *The Oxford English Dictionary, Volume 14*, ed. J.A. Simpson and E.S.C. Weiner (Oxford: Oxford University Press, 1989), 338–339.
- 68 *Ibid.*
- 69 Charlton T. Lewis and Charles Short, *A Latin Dictionary* (Oxford: Oxford University Press, 1969), 1610–1611.
- 70 *The Oxford English Dictionary, Volume 4*, 656–657.
- 71 Lewis and Short, 578.
- 72 Henry George Liddell and Robert Scott, *A Greek–English Lexicon*, revised and augmented by Sir Henry Stuart Jones with the assistance of Roderick McKenzie (Oxford: Oxford University Press, 1969), 444.
- 73 *The Oxford English Dictionary, Volume 4*, 656.
- 74 *Ibid.*
- 75 In 1689, the English Bill of Rights recognized that "the late King James the Second, by the assistance of divers evil counselors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom" (in *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present*, ed. Micheline R. Ishay (New York: Routledge, 1997), 91). While the Bill recognized that considerable violations of the citizens' rights had occurred under James, it concluded "that his said highness the prince of Orange will . . . still preserve them from the violation of their rights, which they have here asserted, and

from all other attempts upon their religion, rights, and liberties” (in *Ibid.*, 93). Although the English had successfully challenged the notion that kings ruled by divine right, the Bill perpetuates the idea that a small subset of the population ought to rule over the commoners, provided they do so benevolently.

76 The United States Declaration of Independence in *ibid.*, 127.

77 The French Declaration of the Rights of Man and Citizen in *ibid.*, 138.

78 *Ibid.*

79 *Ibid.*

80 The United States Declaration of Independence in *ibid.*, 127.

81 Whereas the English Bill of Rights recognized the necessity for Protestants to “have arms for their defense suitable to their conditions” (in *ibid.*, 92), the first two amendments to the Constitution of the United States of America hoped that weapons would only be “necessary to the security of a free state,” since Congress could “make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1992, 542).

82 United Nations Charter in Ishay, 406.

83 United Nations Universal Declaration of Human Rights in *ibid.*, 407.

84 As Jonathan Glover points out, in *Humanity: a Moral History of the Twentieth Century* (New Haven: Yale University Press, 2001):

To talk of the twentieth-century atrocities is in one way misleading. It is a myth that barbarism is unique to the twentieth century: the whole of human history includes wars, massacres, and every kind of torture and cruelty: there are grounds for thinking that over much of the world the changes of the last hundred years or so have been towards a psychological climate more humane than at any previous time. But it is still right that much of twentieth-century history has been a very unpleasant surprise. Technology has made a difference. The decisions of a few people can mean horror and death for hundreds of thousands, even millions, of other people. These events shock us not only by their scale. They also contrast with the expectations, at least in Europe, with which the twentieth century began.

(p. 3)

85 William F. Schulz, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon Press, 2002), 26.

86 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 166.

87 *ibid.*, 164.

88 Schulz, 27.

89 *Ibid.*, 26.

4 Human dignity without teleology: human rights and human biology

1 Gary Kalkut and Nancy Neveloff Dubler, “The Line Between Life and Death,” *New York Times* (May 10, 2005).

2 *Ibid.*

3 I will utilize the distinction of human animals and human persons, found in the literature on personhood, despite some discomfort with the former term. While “human beings” seems more appropriate and might better convey my personal feelings of respect and care for pre- and post-persons than “human animals,” maintaining the same language throughout the chapter will ease the discussion.

- 4 Michael J. Perry, "The Morality of Human Rights: a Non-Religious Ground?," *Emory Law Journal* 54 (2005), 128. Perry understands proponents of evolution to be proceeding from what he terms – in *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998) – an absurd universe (p. 14) and, although I think this is a problematic assumption, I won't challenge it here because a) it ultimately makes little difference to my central argument in this chapter and b) he is likely correct that few evolutionary theorists think about the meaning of the universe or of human life in the sense that he has in mind.
- 5 Steven Pinker, *The Blank Slate: the Modern Denial of Human Nature* (New York: Viking, 2002), viii, citation omitted.
- 6 Ibid.
- 7 David DeGrazia, "Identity, Killing, and the Boundaries of Our Existence," *Philosophy & Public Affairs* 31(4) (Fall 2003), 413.
- 8 See Perry, *Idea*, 14.
- 9 While much of what follows will draw on Steven Pinker's accounts of the human mind and human nature, he is by no means the only one to write on these subjects. Interested readers should also see Robert Wright, *The Moral Animal: Evolutionary Psychology and Everyday Life* (New York: Vintage Books, 1995); Gary Marcus, *The Birth of the Mind: How a Tiny Number of Genes Creates the Complexities of Human Thought* (New York: Basic Books, 2004); Richard Dawkins, *The Selfish Gene* (Oxford: Oxford University Press, 1989); Owen Flanagan, *The Problem of the Soul: Two Visions of Mind and How to Reconcile Them* (New York: Basic Books, 2003); and two books by Matt Ridley: *The Origins of Virtue: Human Instincts and the Evolution of Cooperation* (New York: Penguin Books, 1996) and *Genome: the Autobiography of a Species in 23 Chapters* (New York: Perennial, 2000). This list is by no means an exhaustive one, but these books are excellent resources in no small part because of their eloquent presentations of challenging material.
- 10 Pinker, 2.
- 11 Ibid., 5.
- 12 Margaret Mead, *Sex and Temperament in Three Primitive Societies* (New York: William Morrow, 1963), 280.
- 13 Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (New York: Picador, 2002), 20–21.
- 14 Pinker, viii–ix.
- 15 See Ibid., 5–102.
- 16 Ibid., 34.
- 17 Ibid., 35.
- 18 Ibid.
- 19 Gottfried Wilhelm Leibniz, *New Essays on Human Understanding* (New York: Cambridge University Press, 1996), 111.
- 20 Pinker, 54.
- 21 Ibid., 55.
- 22 Ibid.
- 23 Ibid., citation omitted.
- 24 Ibid., citation omitted.
- 25 Ibid.
- 26 Ibid., 100.
- 27 Ibid., 100–101.
- 28 DeGrazia, 417.
- 29 In transplanting only the cerebrum, rather than the whole brain, I follow Eric T. Olson's account of this thought experiment in *The Human Animal: Personal*

Identity Without Psychology (Oxford: Oxford University Press, 1999) because, as he notes,

the whole-brain-transplant story does not clearly distinguish between the Psychological and Biological Approaches. The result of removing and transplanting your cerebrum . . . is a living human animal without a cerebrum, in which your life-sustaining functions continue on, and a human being with your cerebrum and your psychology who nevertheless doesn't seem to be the living animal that was once associated with you.

(p. 45)

30 Ibid., 43.

31 Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), 43.

32 DeGrazia, 418, citation omitted.

33 Ibid., 417

34 Ibid.

35 As McMahan points out

in infancy the degree of psychological connectedness from day to day is not clearly strong, and in very early infancy and during fetal gestation, what connectedness there is is clearly not strong – that is, there are far fewer psychological connections from day to day than half the number that hold over a day in the life of a normal adult.

(p. 44)

On this point, Olson notes that:

According to Piaget, clear signs of intentional or goal-directed behavior appear four to eight months after birth, and infants do not acquire the capacity for symbolic representation – reasoning – until one and a half to two years. Many psychologists now think that Piaget's timetable is a bit late for most children; still it seems clear that you could not have come into existence until at least a year after your birth, if rationality is essential to you.

(p. 75)

36 McMahan, 45.

37 Olson, 88.

38 DeGrazia, 418.

39 Ibid.

40 Olson, 95.

41 DeGrazia, 421.

42 Olson, 124.

43 Ibid., 89.

44 DeGrazia, 421.

45 Olson, 89–90.

46 Ibid., 91.

47 Ibid.

48 The distinction, which arose during debates about death and about which more will be said in the next section, is captured nicely by DeGrazia. In talking about death, then, the whole-brain approach is defined “as the irreversible cessation of all functions of the entire brain, including the brainstem (the functioning of

which is necessary for *spontaneous* cardiopulmonary function,” while the higher brain approach sees “human death as *the irreversible cessation of the capacity for consciousness*” (p. 436).

49 Pinker, 207.

50 Robert Wright, *Nonzero: the Logic of Human Destiny* (New York: Vintage Books, 2001), 287–288.

51 Pinker, 211.

52 For another example, consider the following point about language and representation that Steven Pinker makes in *How the Mind Works* (New York: W.W. Norton & Company, 1999):

If you learned that *wapiti* was another name for an elk, you could take all the facts connected to the word *elk* and instantly transfer them to *wapiti*, without having to solder new connections to the word one at a time. Of course, only your zoological knowledge would transfer; you would not expect *wapiti* to be *pronounced* like *elk*. That suggests you have a level of representation specific to the concepts behind the words, not just the words themselves. Your knowledge of facts about elks hangs off the concept; the words *elk* and *wapiti* also hang off the concept; and the spelling *e-l-k* and pronunciation [elk] hang off the word *elk*.

(p. 86)

53 Wright, *Nonzero*, 288.

54 *Ibid.*

55 Dorothy Hermann, *Helen Keller: a Life* (New York: Alfred A. Knopf, 1998), 11.

56 Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis: Hackett Publishing Company, 1993), 43.

57 Peter Singer, *Writings on an Ethical Life* (New York: Ecco, 2001), 137.

58 Pinker, *Mind Works*, 322–323.

59 Pinker, *Blank Slate*, 33.

60 *Ibid.*, 10.

61 *Ibid.*, 42.

62 *Ibid.*, 41.

63 *Ibid.*, 40–41.

64 *Ibid.*, 108.

65 Elizabeth Allen, Barbara Beckwith, Jon Beckwith, Steven Chorover, David Culver, Margaret Duncan, Stephen Jay Gould, Ruth Hubbard, Hiroshi Inouye, Anthony Leeds, Richard C. Lewontin, Chuck Madansky, Larry Miller, Reed Pyeritz, Miriam Rosenthal, and Herb Schreier, “Against ‘Sociobiology’” in *New York Review of Books* 22(18) (November 13, 1975), 43.

66 Richard C. Lewontin, Steven Rose, and Leon J. Kamin, *Not in our Genes* (New York: Pantheon, 1984), 236.

67 Pinker, *Blank Slate*, 44.

68 *Ibid.*, 53.

69 Robert P. Kraynak, “Defending Human Dignity: The Challenge of Our Times” in *In Defense of Human Dignity: Essays for Our Times*, ed. Robert P. Kraynak and Glenn Tinder (Notre Dame: University of Notre Dame Press, 2003), 4.

70 CNN.com Inside Politics, “Schiavo Ruling Disappoints White House, DeLay” (March 22, 2005). Online available at: www.cnn.com/2005/ALLPOLITICS/03/22/schiavo.reaction/index.html.

71 Timothy P. Jackson, “A House Divided, Again: Sanctity vs. Dignity in the Induced Death Debates” in *In Defense of Human Dignity: Essays for Our*

- Times*, ed. Robert P. Kraynak and Glenn Tinder (Notre Dame: University of Notre Dame Press, 2003), 144.
- 72 Timothy P. Jackson, "The Image of God and the Soul of Humanity: Reflections on Dignity, Sanctity, and Democracy" in *Religion in the Liberal Polity*, ed. Terence Cuneo (Notre Dame: University of Notre Dame Press, 2005), 46.
- 73 Jackson, "House Divided," 157.
- 74 Jackson, "Image of God," 48.
- 75 Jackson, "House Divided," 144.
- 76 *Ibid.*, 144–145.
- 77 Kalkut and Dubler.
- 78 Michael B. Green and Daniel Wikler, "Brain Death and Personal Identity," *Philosophy and Public Affairs* 9(2) (Winter 1980), 116n21.
- 79 Consider DeGrazia on this point about the problem with the whole-brain standard:
- brain-dead bodies can, with mechanical support, maintain integrated functioning. For example, pregnant brain-dead women have maintained bodily functions for months, carrying fetuses to term; and a brain-dead boy has over several years grown, overcome infections, and healed wounds.
(p. 438)
- 80 Jackson, "Image of God," 51, citation omitted.
- 81 Henry George Liddell and Robert Scott, *A Greek–English Lexicon*, revised and augmented by Sir Henry Stuart Jones with the assistance of Roderick McKenzie (Oxford: Oxford University Press, 1969), 444.
- 82 DeGrazia, 423.
- 83 *Ibid.*, 424.
- 84 DeGrazia, 424.
- 85 Peter Singer, *Rethinking Life and Death: the Collapse of our Traditional Ethics* (New York: St. Martin's Griffin, 1994), 43.
- 86 Incidentally, it seems to me that human animals *do* warrant our respect and care. But nothing about that statement entails that they be thought of as persons with dignity and rights. It makes sense to care for those animals who might become – or who once were – human persons, but it is a mistake to conclude that these animals have a right to life.
- 87 Singer, *Writings*, 160.
- 88 *Ibid.*
- 89 David Boonin, *A Defense of Abortion* (Cambridge: Cambridge University Press, 2003), 115.
- 90 *Ibid.*
- 91 *Ibid.*, 128, citation omitted.
- 92 *Ibid.* This does, however, affect that notion – drawn from the ruling in *Planned Parenthood of Pennsylvania v. Casey* – that viability is an important moment to consider in the life of a fetus. As William Cooney suggests – in "The Fallacy of All Person-Denying Arguments for Abortion," *Journal of Applied Philosophy* 8(2) (1991) – it is not: "Does a 5-month-old fetus then *become* a person when that stage of technology exists? Can personhood be a condition relative to and dependent on technology?" (p. 161). If technology were to allow for earlier viability, this would not change the facts about personhood because a viable pre-OCBA fetus lacks a sense of self and, consequently, dignity and rights.
- 93 Pinker, *Blank Slate*, 42–43.

5 Does might make human rights? Sympathy, solidarity, and subjectivity in Richard Rorty's final vocabulary

- 1 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 30–31.
- 2 Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 26.
- 3 It should be noted that Rorty is not opposed to the idea of providing reasons for our actions. He argues, however, that our reasons can only take us so far. As we will see, Rorty has an answer – a reason – to give to those who ask, “Why not act cruelly toward others?”: “Because we believe that cruelty is the worst thing we do; we think of ourselves as the sort of people who seek to minimize suffering, rather than expand it.” If pressed further – “Why are we this sort of people and not another?” – Rorty would have another reason: “We feel as we do because we were socialized in a particular time and place by people who either held this belief themselves or thought that the next generation ought to.” Rorty could continue in this vein for a very long time; the problem is that answers of this sort cannot possibly do what Perry insists is necessary, namely back up on an unchanging, objective reason for respecting the rights of others. The type of reason that Perry is looking for – and that Rorty opposes – is one that transcends the subjectivity that Rorty embraces.
- 4 Rorty, 27.
- 5 Perry quotes Glenn Tinder on the particular danger of rehabilitating Nietzsche in the way that Rorty does:

Many would like to think that there are no consequences – that we can continue treasuring the life and welfare, the civil rights and political authority, of every person without believing in a God who renders such attitudes and conduct compelling. Nietzsche shows that we cannot.

(p. 23)

- 6 Rorty, 27.
- 7 Ibid.
- 8 Ibid., 26.
- 9 Ibid., 27.
- 10 Ibid., 32.
- 11 Ibid. The word “contingency” has been bandied about quite a bit thus far, but it will be helpful to see what exactly Rorty has in mind. He does a particularly nice job of describing the idea of the contingency of selfhood:

Anything from the sound of a word through the color of a leaf to the feel of a piece of skin can, as Freud showed us, serve to dramatize and crystallize a human being's sense of self-identity. For any such thing can play the role in an individual life which philosophers have thought could, or at least should, be played only by things which were universal, common to us all. It can symbolize the blind impress all our behaviors bear. Any seemingly random constellation of such things can set the tone of a life. Any such constellation can set up an unconditional commandment to whose service a life may be devoted – a commandment no less unconditional because it may be intelligible to, at most, only one person.

(p. 37)

- 12 Ibid., 44.
- 13 Perry, 37.

- 14 There is no intelligible (much less persuasive) secular version of the conviction that every human being is sacred; the only intelligible versions are religious. . . . The conviction that every human being is sacred is, in my view, inescapably religious – and the idea of human rights is, therefore, ineliminably religious.

(*ibid.*, 11–12)

15 *Ibid.*, 12.

- 16 Before we go too far, it is clearly important to define what Rorty means when he talks about two closely related terms, metaphysics and foundations. Rorty is a bit hard to pin down on these terms, but he does say the following in *Philosophy and Social Hope* (New York: Penguin, 1999):

The distinction between the found and the made is a version of that between the absolute and the relative, between something which is what it is apart from its relations to other things, and something whose nature depends upon those relations. In the course of the centuries, this distinction has become central to what Derrida calls “the metaphysics of presence” – the search for a “full presence beyond the reach of play”, an absolute beyond the reach of relationality. So if we wish to abandon metaphysics we must stop distinguishing between the absolute and the relative.

(p. xviii)

Eric M. Gander, in *The Last Conceptual Revolution: a Critique of Richard Rorty's Political Philosophy* (Albany: State University of New York Press, 1999), does an excellent job of succinctly elucidating Rorty's meaning:

The metaphysician is one who believes that humans are ultimately accountable to some higher, non-human reality – God, or Reason, or Natural Law, or some analogous “Truth.” This belief is what allows, in fact, compels the metaphysician to adopt the vocabulary of grounding.

(p. 40)

The relationship between metaphysics and foundationalism is a clear one that Rorty highlights later in *Philosophy*:

A foundationalist need only claim that every belief occupies a place in a natural, transcultural, transhistorical order of reasons – an order which eventually leads the inquirer back to one or another “ultimate source of evidence”. Different foundationalists offer different candidates for such sources: for example, Scripture, tradition, clear and distinct ideas, sense-experience, common sense.

(p. 151, citation omitted)

Metaphysicians, then, embrace foundations and suggest that their particular foundations are objective rather than subjective. James Conant, in “Freedom, Cruelty, and Truth: Rorty versus Orwell” in *Rorty and His Critics*, ed. Robert B. Brandom (Oxford: Blackwell Publishers, 2000), argues, as I do, that Rorty has not been successful in his attempt to abandon metaphysics, noting eight characteristically “Rortian theses” that demonstrate “Rorty's own substantial metaphysical commitments” (p. 275). These theses, working to jettison

particular Realist theses to which Conant sets them in opposition, are: “the thesis that solidarity ought to replace objectivity”; “the thesis of linguistic idealism”; “the thesis of instrumentalism concerning linguistic norms”; “the thesis of the conversational basis of moral belief”; “the thesis of historicism”; “the thesis that public and private goods are incommensurable”; “the thesis of Rortian liberalism”; and “the thesis of ironism” (*ibid.*, 275–277). I think Conant makes a compelling point, here, though Rorty’s response, in his “Response to James Conant” in *Rorty and His Critics*, ed. Robert B. Brandom (Oxford: Blackwell Publishers, 2000), is unsurprising:

I think of all the “Rortian” theses he lists as suggestions about how to redescribe familiar situations in order to achieve various practical goals. I think of both archetypal metaphysicians like Plato, Spinoza and Hegel and archetypal anti-metaphysicians like Dewey, Wittgenstein and Heidegger as having made similar suggestions. I see the difference between the metaphysicians and anti-metaphysicians as consisting mainly in the anti-Realism of the latter. In my jargon, “metaphysical” and “Realist” are pretty well co-extensive terms.

(p. 344)

Rorty seeks to avoid the charge of being a metaphysician himself by suggesting that “Conant obviously attaches a very different meaning to the term ‘metaphysical’ than I do, and I wish that he had explained his use of the term in more detail.” My argument in this chapter, generally sympathetic with Conant’s, is more specific in substance – particularly on the question of Rorty’s own metaphysical foundations – and offers a further challenge to Rorty’s claim, just above, that he is simply offering “suggestions about how to redescribe familiar situations in order to achieve various practical goals” (*ibid.*).

17 Richard Rorty, *Objectivity, Relativism, and Truth: Philosophical Papers, Volume 1* (Cambridge: Cambridge University Press, 1991), 177.

18 Steven Kautz, *Liberalism and Community* (Ithaca, NY: Cornell University Press, 1995), 77, citation omitted.

19 *Ibid.*, 78–79.

20 Rorty, *Contingency*, 29.

21 Kautz, 79.

22 Perry, 38. However, this argument about cost might not hold. The central premise of William F. Schulz’s compelling book, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon Press, 2002), is that:

respect for human rights both in the United States and abroad has implications for our welfare far beyond the maintenance of our ethical integrity. Ignoring the fates of human rights victims anywhere almost invariably makes the world – *our* world – a more dangerous place. If we learned nothing else from the horrific events of September 11, perhaps we learned that.

(p. xix)

23 Perry, 37–38, citations omitted.

24 Richard Rorty, *Consequences of Pragmatism: Essays, 1972–1980* (Minneapolis: University of Minnesota Press, 1982), xlii.

25 Rorty defines a liberal ironist, in *Contingency*, as

the sort of person who faces up to the contingency of his or her own most central beliefs and desires – someone sufficiently historicist and nominalist to have abandoned the idea that those central beliefs and desires refer back to something beyond the reach of time and chance. Liberal ironists are people who include among these ungroundable desires their own hope that suffering will be diminished, that the humiliation of human beings by other human beings may cease.

(p. xv)

26 Perry, 38.

27 Rorty, *Contingency*, xv.

28 Kautz seems to agree with Rorty on this point; he argues that “we may not deny [other human beings] their natural rights,” but also – strangely – that “liberals are under no obligation to concern themselves with the preservation of the ways of life of those who are not members of our community” (p. 106). He goes on to suggest that “The liberal American would perhaps be willing to fight in a war to preserve our American way of life,” but “perhaps” is not a particularly strong word and it is not clear if our protection should be extended to include fledgling versions of our way of life in non-American communities. My sense is that Kautz’s version of liberalism would not come to the aid of the ‘other’ in this situation, especially given his footnote about Michael Walzer’s discussion of this problem in *Spheres of Justice*: “Walzer’s account is in certain respects too humane, it seems to me; Walzer sometimes emphasizes duties to humanity at the expense of the duties and rights of consenting liberal individuals” (p. 106n).

29 Rorty, *Contingency*, 63.

30 *Ibid.*, 46. This is what Rorty has in mind when he discusses the concept of a final vocabulary. He says

All human beings carry about a set of words which they employ to justify their actions, their beliefs, and their lives. These are the words in which we formulate praise of our friends and contempt for our enemies, our long-term projects, our deepest self-doubts and our highest hopes. They are the words in which we tell, sometimes prospectively and sometimes retrospectively, the story of our lives. . . . [T]heir user has no noncircular argumentative recourse. Those words are as far as he can go with language; beyond them there is only helpless passivity or a resort to force.

(p. 73)

31 Rorty, *Objectivity*, 185.

32 Kautz, 102.

33 *Ibid.*, 103.

34 Rorty, *Contingency*, 65.

35 Of course, Rorty would undoubtedly argue that – once again – his theory is being upbraided for its failure to adequately take into account the metaphysical needs of others and provide reasons to calm their fears, tasks for which it is specifically not designed.

36 Rorty, *Contingency*, 84.

37 *Ibid.*

38 *Ibid.*, 84–85.

39 In what sense is Rorty’s theory an obviously frustrating one? Jonathan Glover points out, in a section of *Humanity: a Moral History of the Twentieth Century* (New Haven: Yale University Press, 2001) entitled “The Soul and the

Hunger for Belief” (in the midst of his discussion of Nazism, interestingly), that “People want their lives to add up to something, to contribute to something larger than themselves. . . . There is a need for transcendence: for something that reaches to the soul.

(p. 362)

- 40 That said, a compelling argument can be made against Rorty here, namely that our common history is actually one of considerable inhumanity. As Glover notes:

At the start of the century there was optimism, coming from the Enlightenment, that the spread of a humane and scientific outlook would lead to the fading away, not only of war, but also of other forms of cruelty and barbarism. They would fill the chamber of horrors in the museum of our primitive past. In the light of these expectations, the century of Hitler, Stalin, Pol Pot and Saddam Hussein was likely to be a surprise. Volcanoes thought extinct turned out not to be.

(p. 6)

Of course, Rorty would likely suggest that these examples are precisely the sort of historical proof we can use to suggest that the human rights regime is one with great practical advantages over a global order that permits regimes like these to act with impunity.

- 41 Perry, 29.

- 42 Rorty, *Contingency*, 85.

- 43 Ibid.

- 44 Recall Nietzsche’s assertion, in *The Will to Power*, trans. Walter Kaufmann and R.J. Hollingdale and ed. Walter Kaufmann (New York: Vintage Books, 1968), that the death of God would result in the destruction of morality: “Naïveté: as if morality could survive when the *God* who sanctions it is missing! The ‘beyond’ absolutely necessary if faith in morality is to be maintained” (p. 147).

- 45 Rorty, *Contingency*, 86.

- 46 It seems important to note, here, that it is not entirely so clear that the United States is seeing a decline in religious belief. More than most liberal countries, America remains by and large a nation of believers. As Steven Pinker points out, in *The Blank Slate: the Modern Denial of Human Nature* (New York: Viking, 2002)

According to recent polls, 76 percent of Americans believe in the biblical account of creation, 79 percent believe that the miracles in the Bible actually took place, 76 percent believe in angels, the devil, and other immaterial souls, 67 percent believe they will exist in some form after their death, and only 15 percent believe that Darwin’s theory of evolution is the best explanation for the origin of human life on Earth.

(p. 2, citation omitted)

And, to the extent that there has been any decline in religious belief amongst American liberals, we must also note a clearly expressed discontent about the decay of morality and the traditional family structure. That said, the same discontent is not nearly as pronounced in Europe, where the level of religious belief is markedly lower. In further defense of Rorty’s position, Europeans

generally seem to have a much more pronounced commitment to the contemporary international human rights regime than do Americans.

- 47 Rorty, *Contingency*, 87.
- 48 *Ibid.*, 85.
- 49 *Ibid.*, xv.
- 50 *Ibid.*, 89.
- 51 *Ibid.*, 90.
- 52 *Ibid.*
- 53 *Ibid.*, 91.
- 54 *Ibid.*, 92.
- 55 Perry, 28.
- 56 Rorty, *Contingency*, 93.
- 57 It is interesting to note, of course, that Rorty's project is itself in violation of this dictate. Good liberal ironists ought to avoid public re-descriptions of others' final vocabularies, but Rorty's work is well-known precisely because of his very public critiques of Enlightenment metaphysics.
- 58 Conant challenges Rorty about O'Brien's motivation for torturing Winston in Orwell's *1984*, noting that:

Rorty's reading threatens to leave O'Brien appearing peculiarly obsessed with getting Winston to assent to falsehoods for no particular reason. Rorty sees the problem this poses for his reading and draws the only conclusion he consistently can in light of his interpretive claim: the obsession with getting Winston to assent to falsehoods is simply O'Brien's obsession and has nothing to do with O'Brien's own attachment to the beliefs of whose truth he tries to convince Winston.

(p. 290)

What Conant suggests, here, is a very different reading of O'Brien from Rorty's, namely that O'Brien might actually be a firm believer in the Party and not at all an ironist.

- 59 Rorty, *Contingency*, xv.
- 60 Rorty and Judith Shklar (from whom he borrows this basic definition of liberalism) believe it can be thus boiled down. For more of Shklar's discussion of humiliation, see her *Ordinary Vices* (Cambridge, MA: Belknap Press of Harvard University Press, 1984).
- 61 Rorty, *Contingency*, 94.
- 62 *Ibid.*, 92–93.
- 63 *Ibid.*, 94.
- 64 *Ibid.*, 91.
- 65 *Ibid.*, 89.
- 66 *Ibid.*, 94–95.
- 67 *Ibid.*, 96.
- 68 *Ibid.*, 119–120.
- 69 *Ibid.*, 120–121.
- 70 *Ibid.*, xvi.
- 71 *Ibid.*, xv.
- 72 Richard Rorty, "Truth and Freedom: a Reply to Thomas McCarthy," *Critical Inquiry* 16 (Spring 1990), 636–637.
- 73 Gander, 164.
- 74 Rorty, *Contingency*, 197.
- 75 Rorty, "Truth and Freedom," 636–637.
- 76 Perry makes a strikingly similar claim in his discussion of subjectivity and objectivity:

“Imagine someone saying to a Bosnian Serb: “The Bosnian Muslim, too, no less than you, is sacred. It is wrong for you to rape her.” If “sacred” is meant in the subjective sense, the Bosnian Serb can reply: “Sacred to you and yours, perhaps, but not to me and mine. In the scheme of things, we happen not to attach much value to her life.” By contrast, ‘sacred’ in the objective sense is not fundamentally a matter of ‘sacred to you’ or ‘sacred to me’; it is, rather, a matter of how things really are. . . . If every human being is sacred in the objective sense, then, in violating the Bosnian Muslim, the Bosnian Serb does not merely violate what some of us attach great value to; he violates the very order of creation.

(p. 28)

The problem with this sort of thinking, Rorty would undoubtedly note, is that the Bosnian Muslim is violated whether one speaks of the subjective or the objective truth about her to the Serb. Rorty suggests that it might be more practical to concern ourselves with preventing that violation rather than with attempting to discover the truth about the world.

77 Gander, 145–146.

78 *Ibid.*, 82.

79 *Ibid.*, 89.

80 Richard Rorty, “What Can You Expect From Anti-Foundationalist Philosophers? A Reply to Lynn Baker,” 78 *Virginia Law Review* 78 (April 1992), 725–726.

81 Rorty, *Contingency*, 61.

82 Gander, 168.

83 *Ibid.* This suggestion brings to mind Tracy B. Strong’s description of Carl Schmitt in “Foreword: Dimensions of the New Debate Around Carl Schmitt” in Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996). Schmitt argued “that politics cannot be made safe and that the attempts to make politics safe will result in the abandonment of the state to private interests and to ‘society’” (p. xv). He is an unusual character because of his decision to join the Nazi Party in 1933 and because, before doing so, he “was among those who sought to strengthen the Weimar regime by trying to persuade Hindenburg to invoke the temporary dictatorial powers of article 48 against the extremes on the Right and the Left” (p. xv, citation omitted).

84 Gander, 168.

85 Norman Geras reaches a similar conclusion in *Solidarity in the Conversation of Humankind: the Ungroundable Liberalism of Richard Rorty* (New York: Verso, 1995). He wonders “why Rorty should sometimes . . . deny that people share a common nature composed of characteristics specific to them as humans, when he also affirms precisely such common human characteristics” (p. 53). See also Jean Bethke Elshtain, “Don’t Be Cruel: Reflections on Rortyan Liberalism” in *The Politics of Irony: Essays in Self-Betrayal*, ed. Daniel W. Conway and John E. Seery (New York: St. Martin’s Press, 1992), though her discussion of this point is brief and mentioned only in passing: “All that matters is a brotherhood and sisterhood of pain and humiliation. This smuggles universalism back in, of course, but that isn’t the most important point” (p. 202).

86 See Richard Rorty, *Essays on Heidegger and Others: Philosophical Papers, Volume 2* (Cambridge: Cambridge University Press, 1991), 143–145; Richard Rorty, *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge: Cambridge University Press, 1998), 299–306; and Rorty, *Philosophy*, 81–88.

Rorty will not, of course, suggest that Darwin was right or that evolutionary biology is the truth about the way the world works. He does, however, proceed quite clearly from Darwinian assumptions in everything he writes. Consider the following examples: “My criticisms of Heidegger . . . and of Derrida . . . center around their failure to take a relaxed, naturalistic, Darwinian view of language” (Rorty, *Essays*, 3); “The antinaturalist self-images suggested to us by, among others, Plato and Kant have served us well, but they are hard to reconcile with Darwin’s account of our origins” (Rorty, *Truth*, 48); and – most clearly:

After Darwin . . . it became possible to believe that nature is not leading up to anything – that nature has nothing in mind. This idea, in turn, suggested that the difference between animals and humans is not evidence for the existence of an immaterial deity. It suggested further that humans have to dream up the point of human life, and cannot appeal to a nonhuman standard to determine whether they have chosen wisely.

(Rorty, *Philosophy*, 266)

87 This argument draws a great deal on the work of Steven Pinker. Though Pinker does not actually go so far as to make this claim, the previous chapter expanded on his cogent explanations of how our minds work with a view to suggesting a connection between self-creation and dignity, a cornerstone of the idea of human rights. I want to build on that idea here by suggesting that – although it runs counter to his claims against human nature – Rorty ought to adopt this distinctly universalistic position, as it is a clear consequence of his theory of human rights.

88 Rorty, *Contingency*, 177.

89 *Ibid.*, 178.

90 Kautz, 106.

91 Richard Rorty, *Truth*, 178.

92 *Ibid.*, 168.

93 Schulz, 24.

94 Rorty, *Contingency*, 38.

95 As the previous chapter showed, a problem arises in thinking about those humans whose brains are incapable of self-creation. Do they too have rights? This is a difficult spot to be in, as it seems that the pervert and the sadist have rights, but not – for example – the innocent fetus whose brain remains incompletely formed. There is, of course, an extensive body of literature on this subject, but it seems to me that there are only two plausible answers: either humans have rights because they have the potential for self-creation (whether they achieve it or not) or else only those whose brains are actually able to engage in self-creation can claim the rights.

96 Rorty, *Contingency*, 33.

97 In “Ironist Theory as a Vocation: a Response to Rorty’s Reply,” *Critical Inquiry* 16(3) (Spring 1990), Thomas McCarthy points out, convincingly I think, why this is a strange move for Rorty to make:

he consistently equates the *contingency* of individual existence . . . with the absence of universal conditions or features of human life. But contingency is opposed to necessity, not universality, and so one might well ask whether there are any contingent universals relevant to thinking about morality and politics.

(p. 649, citation omitted)

The contingent story of the evolution of the universal complex human mind is, I think, relevant.

- 98 Rorty, *Contingency*, xv.
 99 *Ibid.*, 93.
 100 This raises the question – left unanswered above – about *why* we ought to eschew cruelty and encourage self-creation, especially as both are natural characteristics. Beyond Rorty’s response that we avoid cruelty because it is the worst thing we do, we can also turn back to evolutionary psychology for an answer. Using game theory, Robert Wright – in *The Moral Animal: Evolutionary Psychology and Everyday Life* (New York: Vintage Books, 1995) – offers a very helpful summary of this line of thinking about the evolutionary value of compassion and disutility of antagonism. A quotation from biologist George Williams on the strategy of expanding altruism beyond kinship barriers makes the point most clearly: “an individual who maximizes his friendships and minimizes his antagonisms will have an evolutionary advantage, and selection should favor those characters that promote the optimization of personal relationships” (Wright, 190). Why not be cruel, then? Simply stated, in the long run it is in our best interests not to be. Of course, Wright also points out the trouble with this sort of thing:

Some people worry that the new Darwinian paradigm will strip their lives of all nobility. If love of children is just defense of our DNA, if helping a friend is just payment for services rendered, if compassion for the down-trodden is just bargain-hunting – then what is there to be proud of?
 (ibid., 376)

Although this sort of argument might very well leave us feeling a bit cold, it nonetheless provides a clear and compelling answer to the question about why we ought not privilege the cruelty of which we are capable. Further, Wright argues that we are not forced to act this way *simply* because it’s in our best interest; we can, in some sense, transcend our nature and act morally: “Go above and beyond the call of a smoothly functioning conscience; help those who aren’t likely to help you in return, and do so when nobody’s watching. This is one way to be a truly moral animal (ibid., 377).

- 101 *Ibid.*, 46.
 102 Rorty, “Truth and Freedom,” 636–637.
 103 Rorty, *Contingency*, 179.
 104 One might well ask whether Rorty is as thorough-going a pacifist as I suggest; indeed, it is possible to read his words, here, as nothing more than the prescription for an ideal society, one that makes the world safe for pacifists. That said, consider his argument, in “Fighting Terrorism with Democracy,” *The Nation* (October 21, 2002).

We may have the strength to keep our democratic institutions intact even after realizing that our cities may never again be invulnerable. We may be able to keep the moral gains – the increases in political freedom and in social justice – made by the West in the past two centuries even if 9/11 is repeated year after year. But we shall only do so if the voters of the democracies stop their governments from putting their countries on a permanent war footing – from creating a situation in which neither the judges nor the newspapers can restrain organizations like the FBI from doing whatever they please, and in which the military absorbs most of the nation’s resources.

- 105 Rorty, *Contingency*, 189.
 106 Ibid., 190.
 107 Ibid., 190–191.
 108 Glover is much more forthcoming than Rorty about the foundations of sympathy and solidarity that he too employs. He recognizes, as Perry and Kautz do, the dangers of Nietzschean philosophy, but argues that:

Fortunately, there are also the “moral resources”, certain human needs and psychological tendencies which work against narrowly selfish behaviour. These tendencies make it natural for people to display self-restraint, and to respect and care for others. They make it unlikely that “morality” in a broad sense will perish, despite the fading of belief in a moral law.

(p. 22)

- 109 Rorty, *Contingency*, 191.
 110 Rorty, *Truth*, 176.
 111 Ibid., 181, citation omitted. Perry has an interesting critique of this language: “in what sense is it a *progress*, and not merely a *change*, of sentiments, if the new sentiments don’t more accurately reflect a *truth* about the Other” (p. 38). Perry is right on this score, it seems to me, although the “truth about the Other” is that the way her brain works affords her with rights to live a self-creative life that is free of humiliation, rather than something more transcendent like that she is sacred or the beloved child of God.
 112 Schulz also adopts Rorty’s pragmatism:

The question to ask about rights is not, Are they true? The question is, Do they work? Do they work to spread empathy, combat cruelty, and protect the weak from their oppressors? The experience of the international human rights community is that these do.

(p. 27)

- 113 Ibid., 23.
 114 Geras, 11. In addition, Elshtain offers five examples of Holocaust rescuers that, like Geras’ examples, suggest problems with Rorty’s theory about personal identification (p. 212–214).
 115 This remark is not meant to imply that people with religious commitments would obviously act heroically, as most did not; instead, I want to subtract those who did so based on religious faith from both theorists’ totals. Rather than saving Jews because they identified with them personally or simply as human beings as such, the people who based their actions on religious dictates are more appropriately placed in a third category. According to Christopher J. Eberle, in “Unnatural Sacrifice” (unpublished manuscript, 2003):

Irrespective of whether the existence of people intent on pursuing genocidal policies is surprising on the theistic hypothesis, theists who adhere to the [Divine Command Theory] should surely expect that, if the world *does* contain people with such evil intentions, then God will obligate them to do what they can to come to the aid of those targeted for destruction.

(p. 22)

This fits in nicely with Geras' examination of

A young French Catholic, Germaine Ribièrè . . . [who] speaks to a rabbi, saying she will help in any way she can. Another entry by her reads, "Humanity is the body of Christ. One part of that humanity is being tortured. . . . And we look on in silence as the crime is being perpetrated." (p. 27)

116 Geras, 24.

117 Ibid., 25.

118 Ibid., 33.

119 Rorty, *Truth*, 181. Consider, however, the argument of Seble Dawit and Salem Mekuria about female genital mutilation in Africa in "The West Just Doesn't Get It," *New York Times* (December 7, 1993):

Instead of being an issue worthy of attention in itself, it has become a powerfully emotive lens through which to view personal pain – a gauge by which to measure distance between the West and the rest of humanity. . . . Superior Western attitudes do not enhance dialogue or equal exchange of ideas A media campaign in the West will not stop genital mutilation.

(p. A27)

120 Rorty, *Truth*, 182.

121 Ibid., 185.

122 Rorty, *Contingency*, 196.

123 Wright, 372.

124 Rorty, *Truth*, 185.

125 Glover, 347, citation omitted.

126 Kautz, 79.

6 Rights and wrongs without God: a non-religious grounding for human rights in a pluralistic world

1 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), 11–12.

2 Alan Dershowitz, *Rights from Wrongs: a Secular Theory of the Origins of Rights* (New York: Basic Books, 2004), 7.

3 Ibid., 81.

4 Ibid., 82.

5 See, for example, Mende Nazer and Damien Lewis, *Slave: My True Story* (New York: PublicAffairs, 2003) and Francis Bok, *Escape From Slavery: the True Story of My Ten Years in Captivity – and My Journey to Freedom in America* with Edward Tivnan (New York: St Martin's Griffin, 2004).

6 Dershowitz, 84.

7 Ibid.

8 This raises the unresolved – and potentially impossible to resolve – question of whether Germans were aware of the genocidal program upon which their leaders embarked. Even if we assume – and I believe we should not – that Germans were generally unaware of the mass murder undertaken by their government, it is clear that Germans were generally supportive of Hitler's regime. Indeed, even two of Germany's most well-respected philosophers, Martin Heidegger and Carl Schmitt, were members of the Nazi Party (with

varying degrees of ardor in different years of the Nazi era). And as Claudia Koonz points out, in *The Nazi Conscience* (Cambridge: Belknap Press of Harvard University Press, 2003):

In 1933 Carl Schmitt, a distinguished political theorist and avid Hitler supporter, paraphrased a slogan used often in Nazi circles when he denounced the idea of universal human rights, saying: Not every being with a human face is human. This belief expressed the bedrock of Nazi morality.

(p. 2)

- 9 Herodotus, *The Histories*, trans. Robin Waterfield (Oxford: Oxford University Press, 1998), 3.38.
- 10 As discussed in the first chapter, Perry's definition of a religious worldview is one that is "grounded or embedded in a vision of the finally or ultimately meaningful nature of the world and of our place in it" (p. 15).
- 11 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1999), 107.
- 12 Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1968), 85.
- 13 Perry, 39.
- 14 Habermas, 9.
- 15 Ibid.
- 16 Richard Rorty, *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge: Cambridge University Press, 1998), 184–185.
- 17 Ian Hacking, *The Social Construction of What?* (Cambridge: Harvard University Press, 2001), vii.
- 18 Ibid., 24.
- 19 Ibid., 68.
- 20 Ibid., 70.
- 21 Arthur C. Danto, "Comment on Gewirth: Constructing an Epistemology of Human Rights: a Pseudo Problem?," *Social Philosophy & Policy* 1(2) (Spring 1984), 30.
- 22 Alan Gewirth, "Reply to Danto," *Social Philosophy & Policy* 1(2) (Spring 1984), 34.
- 23 William F. Schulz, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* (Boston: Beacon Press, 2002), 26.
- 24 For more on the establishment and first session of the Human Rights Commission, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 30–50.
- 25 Heiner Bielefeldt, "'Western' versus 'Islamic' Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights," *Political Theory* 28(1) (February 2000), 90–91, citations omitted.
- 26 Ibid., 92.
- 27 Glendon, 51.
- 28 Ibid., 73.
- 29 Several of these responses are quoted in Glendon, 73–78; others are collected, along with the Committee's report and its questionnaire, in *Human Rights: Comments and Interpretations*, ed. UNESCO (New York: Columbia University Press, 1949).
- 30 Glendon, 73.

- 31 Ibid., 74, citation omitted.
- 32 Ibid.
- 33 Ibid., 75–76, citation omitted.
- 34 Ibid., 77, citation omitted.
- 35 Ibid., citation omitted.
- 36 Ibid., 134.
- 37 Ibid., 225–226. In addition to Glendon’s response, I want to take issue with the criticism that a Western education somehow removes the distinct cultural imprint from people like Chang and Malik or that it makes them more Western than – and no longer representative of – their countrymen. This argument seems to regularly surface only when universal concepts like human rights are at issue; no one suggests, after all, that the movement for Indian independence was a Western one, despite the fact that both Gandhi and Nehru were educated in the West. While I want to argue, then, that Malik and Chang can be considered representatives of their respective cultures, it is also important to note the particular problem that Malik raises. I am grateful to Islamic human rights scholar Recep Senturk for raising the point that Malik, a Lebanese Christian, cannot be said to have represented the thoughts, feelings, ideas, and concerns of the Muslim world in the drafting process. Although Muslims were represented in the UNESCO survey and in the Human Rights Commission, they were notably absent on the drafting committee. As Senturk notes, “it would have been wiser to include a Muslim who is well-versed in the universalistic branch of Islamic law . . . to forestall the later complications which we still face . . . in the Muslim world regarding the UDHR” (e-mail message from Recep Senturk to Ari Kohen, April 4, 2005). I think this is clearly right and obviously problematic, though it is also important to note that the UDHR is perfectly in keeping with the tenets of Islam, as many Islamic scholars argued at the time and as others – including Senturk – have since pointed out. As he notes:

Turkish scholars of Islamic law put their full support behind [the] UDHR even before it was declared. . . . For instance, Huseyin Kazim Kadri wrote a commentary . . . demonstrating how each article is in conformity with Islamic law and therefore should be supported by Muslims.

(E-mail message from Recep Senturk to Ari Kohen, April 6, 2005)

- 38 Glendon, 225.
- 39 Ibid., 226, citation omitted.
- 40 Bielefeldt, 116, citation omitted. For more on the “Project on Religion and Human Rights,” see *Religion and Human Rights*, ed. John Kelsay and Sumner B. Twiss (New York: Project on Religion and Human Rights, 1994).
- 41 Rhoda E. Howard and Jack Donnelly, “Human Dignity, Human Rights, and Political Regimes,” *American Political Science Review* 80(3) (September 1986), 802.
- 42 Ibid., 808.
- 43 Ibid.
- 44 In the first chapter of her recent book, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), Micheline R. Ishay details the contributions of traditional societies to the contemporary notions of human rights and human dignity (pp. 16–61). Looking to their ancient historical documents, she demonstrates that these societies (traditionally as well as today) “urge protection for the poor, the disabled, the sick, and the powerless, praise good and impartial rulings,

- encourage some forms of social and economic justice, condemn arbitrary killing, offer moral prescriptions for wartime, and so forth” (p. 60).
- 45 The reference is to Asmarom Legesse, “Human Rights in African Political Culture” in *The Moral Imperatives of Human Rights: a World Survey*, ed. Kenneth W. Thompson (Washington, DC: University Press of America, 1980). Donnelly offers a far more thorough explication of the argument that human rights are Western in origin and cannot be said to have existed in Islamic, Confucian Chinese, traditional African, or Hindu Indian societies prior to their establishment in the West in “Human Rights and Human Dignity: an Analytic Critique of Non-Western Conceptions of Human Rights,” *American Political Science Review* 76(2) (June 1982). He revises this argument, by removing his discussion of the Soviet Union, and also expands it, by including a discussion of the dearth of rights in the premodern West, in his *Universal Human Rights in Theory and Practice*, Second Edition (Ithaca: Cornell University Press, 2003), 71–88. It is important to note, however, that Donnelly does not dispute the point that I have been making about the universality of human dignity; in fact, his argument seems to support that conclusion even as he contends that the contemporary conception of rights did not proceed from those societies’ recognition of inherent dignity (*ibid.*, 71–72).
 - 46 Abdullahi Ahmed An-Na’im, “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: the Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment” in *Human Rights in Cross-Cultural Perspectives: a Quest for Consensus*, ed. Abdullahi Ahmed An-Na’im (Philadelphia: University of Pennsylvania Press, 1995), 37–38.
 - 47 *Ibid.*, 35.
 - 48 *Ibid.*, 39.
 - 49 Glendon, 59.
 - 50 *Ibid.*, 84–86.
 - 51 *Ibid.*, 88.
 - 52 *Ibid.*, 89, citation omitted.
 - 53 *Ibid.*, 146.
 - 54 *Ibid.*
 - 55 *Ibid.*, citation omitted.
 - 56 *Ibid.*, 142, citation omitted.
 - 57 While the notion is first developed in his *A Theory of Justice*, Revised Edition (Cambridge: The Belknap Press of Harvard University Press, 1999), Rawls spends considerably more time explicating its principles in *Political Liberalism* (New York: Columbia University Press, 1996), 133–172. More recently, the idea of an overlapping consensus is internationalized in Rawls’ *The Law of Peoples* (Cambridge: Harvard University Press, 2001). In order for diverse cultures to reach consensus on principles of justice and human rights, Rawls suggests a trimming of the rights articulated in the Universal Declaration. As Evan Charney notes, in “Cultural Interpretation and Universal Human Rights: a Response to Daniel A. Bell,” *Political Theory* 27(6) (December 1999), “Rawls presents an absolute minimum list of basic human rights that any society must uphold in order to be what he terms a ‘member in good standing’ of the ‘society of peoples’” (p. 842). I argue, in this chapter, that Rawls’ trimming of the UDHR might not be necessary in order to achieve the international consensus on human rights that he seeks.
 - 58 There is, of course, considerable controversy in Rawls scholarship on the question of whether the principles of justice articulated in *A Theory of Justice* survive in *Political Liberalism* or whether the former proves to be an example

of a comprehensive doctrine that might be compatible with, but is not fully realized in, all forms of political liberalism.

59 Rawls, *Political Liberalism*, 137.

60 Glendon, 164.

61 *Ibid.*, 165.

62 Glendon offers a description of the voting that took place that night:

When the speeches were over, the General Assembly polled the members on each article separately, with an impressive result: twenty-three of thirty articles gained unanimous approval. A few scattered abstentions were recorded on Articles 1 and 2 – as well as on the articles dealing with freedom of movement, freedom of religion, freedom of opinion and expression, the right to education, and the article stating that everyone has a right to a social and international order in which the Declaration's rights can be fully realized. There were no nays except on the nondiscrimination article (one vote); the article on the family (six votes); and the article on freedom of opinion and expression (seven votes). With the Declaration certain of adoption at that point, the president called the roll and drew by lot the name of the country to vote first, Burma. After Burma voted yes, Byelorussia, next in order, abstained, as did the other members of the Soviet bloc when their turns came up – Czechoslovakia, Poland, the Ukraine, the USSR, and Yugoslavia. It had been clear from the beginning that South Africa would be unable to accept the Declaration, but she too abstained rather than voting against it. So did Saudi Arabia, breaking ranks with the other Muslim nations that had voted yes. The final tally was forty-eight in favor, eight abstentions, and none opposed. Two countries, Honduras and Yemen, were absent.

(pp. 169–170)

To this, David P. Forsythe – in “Human Rights Fifty Years after the Universal Declaration: Reconciling American Political Science and the Study of Human Rights,” *PS: Political Science and Politics* 31(3) (September 1998) – adds:

No state has ever sought to join the United Nations but reserve against Articles 55 and 56 of the UN Charter, which mandate cooperation on human rights. Of the eight states that abstained from the General Assembly vote in 1948 approving the Universal Declaration, all but Saudi Arabia have publicly renounced their abstentions.

(p. 508)

63 Donnelly, *Human Rights*, 41.

64 *Ibid.*, 40, citation omitted.

65 Rawls, *Political Liberalism*, 153.

66 Donnelly, *Human Rights*, 39.

67 *Ibid.*, 43.

68 Alan Gewirth, “The Epistemology of Human Rights,” *Social Philosophy & Policy* 1(2) (Spring 1984), 3.

69 There is significant disagreement on this subject that dates back at least as far as Hanna Pitkin's influential 1965–1966 *American Political Science Review* articles. In “Obligation and Consent,” Pitkin ultimately argues that people must decide for themselves whether their actions are right, that anyone else can have a say in whether they judged correctly, and that there might very well be no “last word” on the matter of right and wrong action.

- 70 Habermas, 5.
- 71 Ibid., 32.
- 72 Ibid., 33.
- 73 African [Banjul] Charter on Human and Peoples' Rights in *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present*, ed. Micheline R. Ishay (New York: Routledge, 1997), 473.
- 74 Habermas, 33.
- 75 Ibid.
- 76 I want to argue, here, only that the process of drafting and adopting the Universal Declaration was a democratic one, rather than that those who participated in that process were somehow democratic themselves or were the representatives of democratic governments. As this chapter has demonstrated, many of the countries represented in these deliberations were not themselves democratic and this could certainly constitute a challenge to the claim that the millions of people represented by these individuals at the United Nations participated in any meaningful way in the drafting and adoption of the UDHR. That said, the intervening years have seen the end of many of these non-democratic governments – the Soviet Union, for example – and the adoption, by the new and more democratic regimes, of the principles enshrined in the Universal Declaration.
- 77 Habermas, 18.
- 78 Dershowitz makes much of this point – indeed, he bases his entire argument on it – and, I believe, rightly so. Yet, as I have argued above, I see his conclusion as lacking the sort of specificity that I am attempting to reach, here, on the question of the foundation for human rights, which – contra Dershowitz – I take to be human dignity rather than human wrongs.
- 79 United Nations Universal Declaration of Human Rights in Ishay, *Human Rights Reader*, 407.
- 80 Habermas, 26.
- 81 Ibid., 19.
- 82 Perry, 28.
- 83 Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 53.
- 84 Glendon, 147, citation omitted.
- 85 Rawls, *Political Liberalism*, 153, citation omitted.
- 86 Glendon, 77, citation omitted.
- 87 Ibid., 78, citation omitted.

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