

BOOK REVIEW

REVIEW ESSAY: THE DISINTEGRATION OF THE IDEA OF HUMAN RIGHTS

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NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* (Princeton Univ. Press 2008).

INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND CRITICS (Lawrence S. Cunningham ed., Univ. of Notre Dame Press 2009).

MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* (Cambridge Univ. Press 2007).

JAMES GRIFFIN, *ON HUMAN RIGHTS* (Oxford Univ. Press 2008).

G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (Harvard Univ. Press 2008).

MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (Farrar, Straus & Giroux 2009).

CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (Oxford Univ. Press 2009).

INTRODUCTION

It is widely,¹ though hardly universally,² held that the promotion and defense of human rights precisely as human rights, is desirable as a matter of morality,

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1. See, e.g., MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* 4 (Cambridge Univ. Press 2007) (arguing that “[a]lthough it is only one morality among many, the morality of human rights has become the dominant morality of our time”); see also The 1948 Universal Declaration of Human Rights (1948), <http://www.un.org/en/documents/udhr>.

2. See, e.g., Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993*, at 111 (Stephen Shute & Susan Hurley eds., 1993); Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008) (seeking to distinguish and focus in practice on the promotion of human welfare rather than human rights). We set aside for the moment any broader philosophical or scientific position that is plainly incompatible with typical understandings of human rights. For one example of such a materialist view, see *infra* note 84. For a somewhat different perspective, consider the well-regarded novelist Mary Gordon: “[W]e say we believe ‘all men are created equal,’ but we don’t live, we probably don’t even want to live, as if it were true.” MARY GORDON, *READING JESUS: A WRITER’S ENCOUNTER WITH THE GOSPELS* 93 (2009). For an attempt to combine a form of relativism with Kantian or Aristotelian approaches, see STEVEN LUKES, *MORAL RELATIVISM* 158-59 (2008).

law, and policy. But what if the very idea of a defensible human right is, in various ways, disintegrating before us? This Review explores this possibility.

The past few years have seen the publication of a remarkable number of deeply considered books on the theories of human rights, basic justice, and related subjects. The particular books listed above and briefly referred to below, as much as they vary among themselves, all fit within this category. The reader of this Review must be forewarned that none of these books focuses centrally on the question of the disintegration of the idea of a defensible human right, the theme of this Review. Broader and lengthier synopses of each of the books are but a few clicks away. But if the idea of a human right is indeed in the process of unraveling, that fact alone is worth noting.

Out of respect for the respective book authors and the readers of this Review, however, we will consider each book separately and in turn, as opposed to merely swirling each throughout, as fragments in a thematic essay. Each book will be introduced, but the depth of scholarship, care, and subtlety in argumentation, and the sheer breadth of scope of each will preclude fair summary herein.

Nor does any uniquely best order of presentation suggest itself, even for the sake of establishing our disintegrationist theme. Let us therefore simply begin with what is in some ways the most metaphysically ambitious and academically controversial treatment, that of the distinguished philosopher Nicolas Wolterstorff.

I. WOLTERSTORFF'S EXPLICIT THEISM

Nicholas Wolterstorff argues that there are genuine human rights only because, or only if, there is a God of a traditional sort who "bestows" the necessary sort of worth on human beings through God's permanent and equal "attachment" love for every human being.³ Human rights are thus not fundamentally a matter of a divine command,⁴ nor do they exist because of any

3. The very heart of Wolterstorff's obviously broader and more nuanced account is found at NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* 352-61 (Princeton Univ. Press 2008) [hereinafter WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS*]. For a highly condensed partial version, see Nicholas Wolterstorff, *Can Human Rights Survive Secularization?*, 54 *VILL. L. REV.* 411 (2009). For discussion, see Richard J. Bernstein, *Does He Pull It Off? A Theistic Grounding of Natural Inherent Human Rights?*, 37 *J. RELIGIOUS ETHICS* 221 (2009); Mark C. Murphy, Book Review, 119 *ETHICS* 402 (2009); Paul Weithman, *God's Velveteen Rabbit*, 37 *J. RELIGIOUS ETHICS* 243 (2009); Nicholas Wolterstorff, *Justice as Inherent Rights: A Response to My Commentators*, 37 *J. RELIGIOUS ETHICS* 261 (2009) [hereinafter Wolterstorff, *Justice as Inherent Rights*] (responding in particular to Bernstein and Weithman, *supra*), as well as the brief reviews by Daniel A. Dombrowski, Book Review, 89 *J. RELIGION* 278 (2009) and Richard W. Garnett, *Righting Wrongs and Wronging Rights*, 186 *FIRST THINGS* 48 (2008).

4. For a sampling of the variety and sophistication of Divine Command (or Divine Preference) theories of ethics more broadly, see, for example, ROBERT MERRIHEW ADAMS, *FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS* (1999); THOMAS L. CARSON, *VALUE AND THE GOOD LIFE* (2000); MARK C. MURPHY, *AN ESSAY ON DIVINE AUTHORITY* (2002); LINDA TRINKAUS

inherent quality or capacity humans possess,⁵ nor are there adequate secular grounds for a belief in equal and universal human rights.⁶

To shed light on the idea of God's attachment love for human beings, Wolterstorff refers to the case of a child whose fondness and attachment for a particular teddy bear is not, and perhaps never was, dependent upon any inherent qualities of the bear in question.⁷ We may assume the child's attachment love or bonding to persist despite, or even because of, the bear's now undeniably tattered, raggedy condition. Independent of the child's attachment love, we might see no reason not to consign the otherwise undistinguished, fungible, perhaps even unwholesome bear to the dumpster.

But if we choose to preserve and maintain the bear, our doing so may reflect more than mere sentimentality or even empathy for the child. We may sensibly believe that although we would, of course, not be wronging the bear itself in disposing of it, we might well be genuinely wronging the child.

We must now replace the parties in this case with their counterparts. The raggedy, intrinsically undistinguished bear corresponds, at least in some loose sense, to every human being. The potential discarder of the raggedy bear becomes any person or entity that might choose to violate the human rights of any human being. And for the child, we substitute a God who loves all human beings, whatever their defects and impairments, universally, equally, and permanently, in a way that bestows or confers worth on all such persons, of a sort that grounds their human rights.

Wolterstorff is careful to emphasize that he has not tried to show the existence of the necessary sort of God.⁸ His argument for human rights is thus hypothetical, or contingent upon theistic commitments not argued for. Certainly,

ZAGZEBSKI, *DIVINE MOTIVATION THEORY* (2004); Philip L. Quinn, *Divine Command Theory*, in *THE BLACKWELL GUIDE TO ETHICAL THEORY* 53 (Hugh LaFollette ed., 2000). For discussion of an earlier perspective, see Peter King, *Ockham's Ethical Theory*, in *THE CAMBRIDGE COMPANION TO OCKHAM* 227 (Paul Vincent Spade ed., 1999).

5. See, e.g., WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS*, *supra* note 3, at 352, and more generally at 348-61. Wolterstorff thus does not rely heavily on the traditional idea of the *imago dei*, or of all humans being created in the relevant image and likeness of God. See *id.* at 348-52 and *infra* note 6.

6. See WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS*, *supra* note 3, at 323-41 (discussing in succession the proposals of Immanuel Kant, Ronald Dworkin, and Alan Gewirth). The general, overarching response is roughly that all the secular properties we might point to are either insufficiently meaningful to bear the weight, or are not shared by all humans, or plainly come in degrees in such a way as to undermine equality of rights. For further discussion, see JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (1999); JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY* (2002).

7. See WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS*, *supra* note 3, at 359-60.

8. See *id.* at 360-61. For what amounts at least roughly to an attempt along those lines, based on a cumulative-case Bayesian probabilistic argument, see RICHARD SWINBURNE, *THE EXISTENCE OF GOD* (2d ed. 2004). See also WILLIAM LANE CRAIG & QUENTIN SMITH, *THEISM, ATHEISM, AND BIG BANG COSMOLOGY* (1993).

Wolterstorff is entitled to rely on an intellectual division of labor in this respect.⁹ It is also open to anyone to reject any one or more, if not all, of Wolterstorff's theistic premises.¹⁰ For all such critics, Wolterstorff's argument cannot get off the ground. Wolterstorff has in this sense given the contemporary secularist no compelling reason to accept the idea of equal and universal human rights.

Of course, even an argument as thoughtful as Wolterstorff's will inevitably be subject to internal critique as well. Perhaps the most important such internal critique is suggested by Wolterstorff's own teddy bear case. Simply put, we may wrong the child if we callously discard the raggedy bear. But we clearly do not thereby also wrong the bear itself. Now, human beings generally seem much more susceptible of being wronged than do teddy bears. On Wolterstorff's account, we can fathom why seriously wronging a human being could count as a serious wrong against God. But it remains unclear why, on Wolterstorff's account, the wrong accrues not only against God, but also against the human being upon whom worth has been bestowed, and in the specific form of a human rights violation.¹¹

II. MACINTYRE'S OCCLUDED THEISM

Alasdair MacIntyre's most recent contributions to ethical theory¹² are widely known and respected. To the book under review,¹³ MacIntyre has contributed a fifty-two-page chapter entitled "Intractable Moral Disagreements,"¹⁴ as well as

9. It is also possible that if someone found Wolterstorff's account of human rights to otherwise be the best or even the only convincing account, that judgment could perhaps count as an argument, of some weight, backwards, in favor of Wolterstorff's theistic premises. See Wolterstorff, *Justice As Inherent Rights*, *supra* note 3, at 272.

10. See, for example, the discussion of Richard Rorty's non-metaphysical pragmatism in Timothy P. Jackson, *The Theory and Practice of Discomfort: Richard Rorty and Pragmatism*, 51 THOMIST 270 (1987) and Bernstein, *supra* note 3, at 231-33. For one very specific question, we might, assuming God's existence, ask how we could reasonably determine whether God's love in history is equal for all persons and groups.

11. For discussion, see Weithman, *supra* note 3. For Wolterstorff's response to Weithman, see Wolterstorff, *Justice as Inherent Rights*, *supra* note 3, at 274-75 (arguing that "[b]estowed honor is a form of worth").

12. See, e.g., ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMANS BEINGS NEED THE VIRTUES* (1999); ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* (1990); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988), and classically, ALASDAIR MACINTYRE, *AFTER VIRTUE* (3d ed. 2007) (1981). Critically, see the edited collections ALASDAIR MACINTYRE (Mark C. Murphy ed., 2003); *AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE* (John Horton & Susan Mendus eds., 1994).

13. *INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASTAIR MACINTYRE AND CRITICS* (Lawrence S. Cunningham ed., Univ. of Notre Dame Press 2009) [hereinafter *INTRACTABLE DISPUTES*].

14. Alasdair MacIntyre, *Intractable Moral Disagreements*, in *INTRACTABLE DISPUTES*, *supra*

a twenty-page response to several accompanying critiques.¹⁵

Among what persons commonly disagree over are the very existence, substance, and enforcement of human rights.¹⁶ To what extent are such disagreements subject to consensual rational resolution? In answering this question, MacIntyre draws upon his own prior work in the Aristotelian-Thomistic natural law tradition,¹⁷ along with elements of the communicative ethics of Jurgen Habermas.¹⁸ MacIntyre seeks to show both the power and the limitations of his own approach to human rights.

MacIntyre, unlike Wolterstorff, seeks to avoid any appeal to theistic premises, as opposed to more generally accessible insights of reason.¹⁹ His argument, however, implicitly relies on theistic ideas for support. In the end his argument would in a sense be strengthened on its own terms, while being rendered much more controversial, by acknowledging his need for specifically theistic premises. There seems no escape from this dilemma in practical persuasion.

note 13, at 1.

15. Alasdair MacIntyre, *From Answers to Questions: A Response to the Responses*, in *INTRACTABLE MORAL DISPUTES*, *supra* note 13, at 313.

16. See Jean Porter, *Does the Natural Law Provide a Universally Valid Morality?*, in *INTRACTABLE DISPUTES*, *supra* note 13, at 53.

17. Among the most noteworthy recent treatments of natural law theory, any of which cites earlier work, see, for example, AQUINAS'S SUMMA THEOLOGIAE: CRITICAL ESSAYS (Brian Davies ed., 2006); REBECCA KONYNDYK DEYOUNG ET AL., AQUINAS'S ETHICS: METAPHYSICAL FOUNDATIONS, MORAL THEORY, AND THEOLOGICAL CONTEXT: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS (2009); THE ETHICS OF AQUINAS (Stephen J. Pope ed., 2002); JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY (1998); PAMELA M. HALL, NARRATIVE AND THE NATURAL LAW: AN INTERPRETATION OF THOMISTIC ETHICS (1994); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS (2006); NATURAL LAW AND MODERN MORAL PHILOSOPHY (Ellen Frankel Paul et al., eds. 2001); NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992); JEAN PORTER, NATURAL & DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS (1999); JEAN PORTER, NATURE AS REASON (2005); ELEONORE STUMP, AQUINAS (2003).

18. See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., MIT Press 1996); JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nichol森 trans., MIT Press 1990); JÜRGEN HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984); see also JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION (Ciaran Cronin ed., Polity Press 2008); THE COMMUNICATIVE ETHICS CONTROVERSY (Seyla Benhabib & Fred Dallmayr, eds. 1990). For a specific application, see R. George Wright, *Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem*, 76 CHI.-KENT L. REV. 991 (2000).

19. In seeking to develop a largely Thomistically-inspired natural law theory that purports to not depend upon theistic premises, MacIntyre implicitly follows the example of JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). Finnis' argument would also require accepting theistic premises to achieve plausibility on its own terms. But of course, adding in specifically theistic premises reduces the appeal of the entire argument for many persons.

At a general level, MacIntyre contends that arguments for or against human rights can gain some real purchase even across different traditions of thought. One tradition may be better able than the other to predict, explain, and resolve problems and breakdowns internal to the other tradition, as perhaps both traditions self-critically evolve.²⁰ But on the other hand, and by way of limitation, there may be insufficient shared premises and common ground for even a rationally superior tradition to inescapably rationally defeat the arguments of its opponents.²¹

MacIntyre's own particular argument is that as social beings, we require universally free, open, unthreatening, and unconstrained social deliberation over the truth of the best means to promote our visions of the ultimate human good and of the proper roles of other human goods. Our collective deliberation over time must, by its nature, aim at achieving insights into truth, rather than merely expressing preexisting inequalities of power, uncritical self-interest, irrationality, or any threat to coerce any participant.²²

These conditions for the social deliberative pursuit of truth are said to be "universal," "exceptionless," and "presupposed" as "principles [of] practical reasoning," rather than drawn as conclusions at the end of our practical reasoning.²³ But crucially, according to MacIntyre, in recognizing these qualities of shared practical deliberation, we have already thereby accepted (identical) principles of Thomistic natural law, and have also come some distance in understanding how the natural law requires that a just political society itself be structured.²⁴

We can, however, imagine a cogent response to MacIntyre from, say, the utilitarian tradition. There are many possible forms of utilitarianism, with none evidently purer than many others.²⁵ A utilitarian, intent on somehow maximizing utility, in some sense, over some time frame, certainly need not feel bound by MacIntyre's argument generally, or for human rights in particular.²⁶ Utilitarians may, or may not, accept any universal rules of the sort endorsed by MacIntyre. A utilitarian might under certain conditions for the sake of utility exclude certain persons from the deliberative process, or constrain their participation in certain respects.²⁷

20. See MacIntyre, *Intractable Moral Disagreements*, in *INTRACTABLE DISPUTES*, *supra* note 13, at 4, 33.

21. See *id.* at 4, 32.

22. See *id.* at 20-23.

23. See *id.* at 24.

24. See *id.* at 23.

25. See the very useful distinctions articulated in David Lyons, *The Moral Opacity of Utilitarianism*, in *MORALITY, RULES, AND CONSEQUENCES: A CRITICAL READER* 105 (Brad Hooker et al. eds., 2000).

26. See MacIntyre, *Intractable Moral Disagreements*, in *INTRACTABLE DISPUTES*, *supra* note 13, at 31.

27. It is probably fair to include even J.S. Mill within this category, in several respects. See *JOHN STUART MILL, ON LIBERTY* (Gertrude Himmelfarb ed., Penguin Books 1985) (1859). For

Utilitarian departures from MacIntyre's exceptionless rules might, contrary to MacIntyre's own system, be based not on any a priori principle, but on accumulated experience. Perhaps the utilitarian would conclude that limiting the universality of the pursuit of truth in some contexts actually speeds the discovery or dissemination of truth. Or we might conclude that limiting the deliberative participation of, say, Holocaust deniers pays for itself in other values, even apart from truth.²⁸

In any event, we, along with the utilitarians, could easily envision reasonable departures from the universalist procedures and human rights positions adopted by MacIntyre. Truth is not something that is simply pursued maximally, whatever the costs, or else held in contempt. Truth can rationally be pursued and disseminated at various rates over time, in light of inescapable tradeoffs among whatever contributes to truth-seeking, or tradeoffs with other values.

It would certainly be possible for MacIntyre to, in a sense, strengthen his human rights and other natural law arguments with helpful theistic premises. MacIntyre might then argue, for example, that divine providence serves to infallibly guarantee that lying to a person, or that intentionally and directly limiting that person's deliberative participation, can, over the course of eternity, never pay off in terms of utility, or any other value. But such a theistic buttressing—or grounding—would of course only invite objection and dissent on any number of reasonable grounds.²⁹

III. PERRY'S CHALLENGE TO PURELY SECULAR HUMAN RIGHTS THEORY

Michael J. Perry's work on human rights is a remarkably sophisticated treatment of an unusually broad range of systematically related questions. It ranges from metaethics to subtle issues of legislative and judicial recognition and enforcement, domestically and internationally, typically presented in the context of controversial substantive human rights issues.³⁰ Our focus, however, will be on Perry's narrower critique of some prominent secular, or presumably secular, accounts of human rights.

Perry's own positive doctrine of the foundation of human rights is theistically based. The basic human rights claim is that "every human being has inherent

discussion of the limitations of typical utilitarian theory as a human rights theory, see, for example, JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 92-93 (1987).

28. See generally R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 *SAN DIEGO L. REV.* 527 (2006).

29. We saw this more directly and explicitly in the context of Nicholas Wolterstorff's argument, *supra* Part I. For a broader critique of MacIntyre's argument, see Porter, *Does the Natural Law Provide a Universally Valid Morality?*, in *INTRACTABLE DISPUTES*, *supra* note 13, at 74-75, 81, 90-91.

30. In addition to the present volume, see, for example, MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11-41 (1998), as well as MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* ch. 1 (Cambridge Univ. Press 2009).

dignity and is inviolable.”³¹ The ground for this assertion reflects God’s nature, our own nature, the world, and the relationships between ourselves and God. In particular, we “are the beloved children of God” and thus, at least analogically, universally “sisters and brothers to one another.”³² In loving one another, and by implication respecting one another’s human rights, we also contribute to our ultimate flourishing and fulfillment,³³ though we are not aiming at our own flourishing as a goal in doing so.³⁴ Perry’s theistic argument is logically separate from any possible claims that religious motivation itself commonly inspires human rights violations, that religious non-believers can consistently respect human rights, and that there can be all sorts of non-theistic reasons, including sheer self-interest, to support the idea of human rights.³⁵

Perry’s argument against the viability of purely secular human rights theories does not take the form of a universal impossibility theorem, as in the work of Kurt Gödel,³⁶ or Kenneth Arrow.³⁷ Perry instead inductively examines some of the leading candidates for a secular theory of human rights. Among these are the widely recognized works of John Finnis,³⁸ Ronald Dworkin,³⁹ Martha Nussbaum,⁴⁰ contemporary evolutionary biologists,⁴¹ and in a rather more

31. PERRY, *supra* note 1, at 6.

32. *See id.* at 8.

33. *See id.* at 9. More starkly, see HANS URS VON BALTHASAR, *LOVE ALONE IS CREDIBLE* 101 (D.C. Schindler trans., Ignatius Press 2004) (1963) (“Love alone is credible; nothing else can be believed, and nothing else ought to be believed . . .”).

34. *See* PERRY, *supra* note 1, at 11.

35. This is distinct from offering any stable and viable justification and motivation for human rights themselves. It does seem entirely possible, though, for the identification and specification of particular human rights to draw upon secular considerations, including secular versions of ideas such as love, dignity, respect, and equality, as long as those results are compatible with any theistic conceptions necessary for their deeper justification. This issue is raised in Mark Modak-Truran, *Book Review*, 88 *J. RELIGION* 257, 258 (2008).

36. *See, e.g.*, DOUGLAS R. HOFSTADTER, *GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* (20th Anniversary ed. 1999).

37. *See* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed., Yale Univ. Press 1970).

38. *See* FINNIS, *supra* note 19. For discussion of traditional natural law theory as ultimately dependent upon theistic premises, as opposed to merely an autonomous secular reason, see, for example, Russell Hittinger, *Natural Law as “Law”: Reflections on the Occasion of “Veritatis Splendor,”* 39 *AM. J. JURIS.* 1, 11-16 (1994).

39. *See* PERRY, *supra* note 1, at 20-21; *see also* RONALD M. DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010).

40. *See* PERRY, *supra* note 1, at 22-23.

41. *See id.* at 23-25. Perhaps the single most useful source, incorporating a range of sophisticated perspectives, is *EVOLUTION AND ETHICS: HUMAN MORALITY IN BIOLOGICAL AND RELIGIOUS PERSPECTIVE* (Philip Clayton & Jeffrey Schloss eds., 2004). *See also* RICHARD JOYCE, *THE EVOLUTION OF MORALITY* (2006); ANTHONY O’HEAR, *BEYOND EVOLUTION: HUMAN NATURE AND THE LIMITS OF EVOLUTIONARY EXPLANATION* (1997); HOLMES ROLSTON, III, *GENES, GENESIS*

skeptical vein, the pragmatist Richard Rorty.⁴²

Even the most skeptical theorist—perhaps a pure materialist, who denies irreducible human consciousness, genuine freedom, and personhood in the traditional sense—can still appropriate the language of human rights, and endorse human rights on the basis of a broad, mysterious intuition.⁴³ But any secular theory of human rights must also justify the universal reach and equality of human rights, in the face of obvious inequalities among genetic human beings. And the secular human rights theorist, including the secular evolutionary biologist, must finally account reasonably for the substantial and perhaps unrecognized sacrifices we might owe, individually or as a group, to distant genetic strangers who can provide no reciprocity or recompense to anyone.

It can sometimes be personally or professionally beneficial for us to endorse verbally a moral position that, if actually implemented as policy, would call for our own substantial sacrifice, or that might be arbitrary or deeply incoherent.⁴⁴ At some point, though, the secular human rights theorist must explain how a potentially demanding theory of human rights⁴⁵ could over the long run, widely motivate, substantial and perhaps unrecognized sacrifices of individual or group interest for the sake of genetic strangers who cannot possibly repay us, directly or indirectly.

AND GOD (1999); PETER SINGER, *A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION* (1999). For a skeptical reference, see MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 79 (Amy Gutmann ed., 2001) (suggesting some realistic limits to genetic altruism).

42. See PERRY, *supra* note 1, at 26-29; see also Jackson, *supra* note 10. For broader discussion of Rorty, see, for example, ALAN MALACHOWSKI, *RICHARD RORTY* (2002); RICHARD RORTY (Charles Guignon & David R. Hiley eds., 2003); *RORTY AND HIS CRITICS* (Robert B. Brandom ed., 2000). See also SUSAN NEIMAN, *MORAL CLARITY: A GUIDE FOR GROWN-UP IDEALISTS* 88-89 (rev. ed., Princeton Univ. Press 2009) (arguing that “in many fields—like the law . . . the metaphysical questions Rorty dismissed are of great concern. For habits are just habits, and those that require any effort tend to succumb to inertia in the absence of principle”).

43. For a sophisticated version of contemporary intuitionism, see MICHAEL HUEMER, *ETHICAL INTUITIONISM* (2005). See also ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (2005); *ETHICAL INTUITIONISM: RE-EVALUATIONS* (Philip Stratton-Lake ed., 2003). For a brief argument that human rights are, and should be thought of as, indemonstrably self-evident, see Amitai Etzioni, *The Normativity of Human Rights Is Self-Evident*, 32 *HUM. RTS. Q.* 187 (2010).

44. See Michael Huemer, *Why People Are Irrational About Politics*, <http://home.sprynet.com/~owl1/irrationality.htm> (last visited Sept. 30, 2009).

45. See, for example, the classic early discussion by Peter Singer, *Famine, Affluence, and Morality*, 1 *PHIL. & PUB. AFF.* 229, 231 (1972), and PETER UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE* 134 (1996). From religious perspectives, for example, GARTH L. HALLETT, *CHRISTIAN NEIGHBOR-LOVE: AN ASSESSMENT OF SIX RIVAL VERSIONS* 3-6 (1989); TIMOTHY P. JACKSON, *THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE* 10 (2003). For a religious response to the gulf between a broad and generous conception of human rights and the limits of stable, long-term sacrificial human motivation, see JOHN E. HARE, *THE MORAL GAP: KANTIAN ETHICS, HUMAN LIMITS, AND GOD'S ASSISTANCE* 1 (1996).

The ultimate problem is that what is advertised as a secular human rights theory may turn out to be dependent—“parasitic” would be the more pejorative term—on a gradually abandoned theistic culture, however much theism may itself be responsible for human rights violations. The concern is for the long-term, overall motivational effects of what we might call a “deracination,” in which the idea of human rights is uprooted from its nourishing soil, and carefully placed in the lapel of civilization’s evening jacket.⁴⁶ Professor Perry rightly leaves this ultimate concern as an open question.⁴⁷

IV. GRIFFIN’S SEARCH FOR HUMAN RIGHTS DETERMINACY

James Griffin argues that “[w]hen during the seventeenth and eighteenth centuries the theological content of the idea [of human rights] was abandoned, nothing was put in its place,” leaving us with only “indeterminate” references to “human right.”⁴⁸ Griffin’s own proposal seeks what is called a constructivist, or a coherentist as distinct from a rigorously foundationalist,⁴⁹ justification for human rights.⁵⁰ Denying that there is a “sharp” distinction here between “fact and value,”⁵¹ Griffin argues that we have a basic interest—our lives generally go better—in the promotion of our personhood or our rational capacity for “normative agency.”⁵² Normative agency is in turn the “capacity to choose and

46. It is certainly possible to argue that well-meaning persons of any sort, even fifty years from now, will retain a certain basic empathy for the elemental sufferings of others, even distant strangers. Let us hope so, but let us also hope that progress in pharmacology over the next fifty years does not dull the edge of empathy through pharmaceuticals for either the worst-off or, more likely, for potential sacrificers.

47. See PERRY, *supra* note 1, at 29. For further discussion, see DOES HUMAN RIGHTS NEED GOD? (Elizabeth M. Bucar & Barbra Barnett eds., 2005).

48. JAMES GRIFFIN, ON HUMAN RIGHTS 2, 15-18 (Oxford Univ. Press 2008) [hereinafter GRIFFIN, ON HUMAN RIGHTS]. For an authoritative view, see James Griffin, Remarks at the Book Launch (Jan. 23, 2008), available at <http://ethics-etc.com/wp-content/uploads/2008/02/griffin.pdf> (last visited Sept. 25, 2009). See also William J. Talbott, Book Review, NOTRE DAME PHIL. REV. (2008), available at <http://ndpr.nd.edu/review.cfm?id=14645>; Rowan Cruft, *Two Approaches to Human Rights*, 60 PHIL. Q. 176 (2010).

49. For this distinction in a legal context, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1991). Of course, different networks of theory may turn out to be equally coherent, or we may find the question of which network of theory is more internally coherent to be unanswerable in any neutral way. For a brief version of a well-known foundationalist approach to human rights, see Alan Gewirth, *The Basis and Content of Human Rights*, in 23 NOMOS: HUMAN RIGHTS 119 (J. Roland Pennock & John W. Chapman eds. 1981). For critique, see, for example, Richard B. Friedman, *The Basis of Human Rights: A Criticism of Gewirth’s Theory*, in 23 NOMOS: HUMAN RIGHTS, *supra*, at 148.

50. See GRIFFIN, ON HUMAN RIGHTS, *supra* note 48, at 4.

51. See *id.* at 123.

52. See *id.* at 149.

. . . pursue our conception of a worthwhile life.”⁵³ This capacity comprises autonomous choice, free action on one’s choices, and the social and economic means necessary for one’s autonomy and freedom.⁵⁴ In addition, though, Griffin emphasizes that human rights theory must take proper account of the nature and limitations of human beings and their circumstances, or what Griffin calls “practicalities.”⁵⁵

The problem here is that Griffin’s attempt to rely largely upon our best more general ethical theory⁵⁶ ensures either the indeterminacy or, for many persons, the arbitrariness of his theory. Griffin’s reliance on the rational capacity for normative agency in choosing and pursuing our understanding of a worthwhile life would seem, for example, to rule out any human rights for kindergarten students. There are of course, as Griffin recognizes, moral reasons not to painlessly kill kindergarteners. But the idea of some human rights for kindergarteners really does not seem to be an undue expansion of the core idea of human rights.

Or we could instead think of an adult who has the capacity for rationally formulating and pursuing a conception of the good life, but who has never actually done so. Suppose a government violates that adult’s human rights in some way that predictably and perhaps intentionally motivates the adult to, for the first time, actually formulate and pursue a plan of life—perhaps campaigning against human rights violations. In such a case, a human rights violation perhaps intentionally promotes the realization of what was once a mere unused capacity for normative agency.

More fundamentally, the basic relationship between matters of fact and matters of value is not just a matter of overlap, as in Griffin’s theory, but remains broadly controversial.⁵⁷ It is thus hardly surprising, overall, that Griffin must end, as well as begin, with a substantial and disturbing realm of indeterminacy.⁵⁸

V. COHEN ON THE INDEPENDENCE OF ULTIMATE PRINCIPLES FROM FACTS

The late G.A. Cohen’s emphasis is partly on the manipulability and the limited scope, within each society and beyond each individual society, of John

53. *Id.* at 45.

54. *See id.* at 149.

55. *See id.* at 37-39, 44.

56. *See id.* at 4.

57. *See, e.g.,* THE IS/OUGHT QUESTION: A COLLECTION OF PAPERS ON THE CENTRAL PROBLEM IN MORAL PHILOSOPHY (W.D. Hudson ed., 1969); W.D. Falk, *Hume on Is and Ought*, 6 CAN. J. PHIL. 359 (1976). Reference to “thick” concepts such as interests or pain does not resolve the relevant debates. *See also* G.A. COHEN, RESCUING JUSTICE AND EQUALITY 248-50 (Harvard Univ. Press 2008).

58. *See* GRIFFIN, ON HUMAN RIGHTS, *supra* note 48, at 128 (“[A]t a fairly early point in assessing policies such as ‘Don’t deliberately kill the innocent[,]’ we reach a point where we can no longer tell that one policy is better than another.”).

Rawls's famous "difference principle."⁵⁹ Cohen's "luck egalitarianism" challenges what is sometimes thought of a natural, unproblematic, or deserved inegalitarian distribution of crucial economic assets, including one's scarce talents, that can be manipulated for selfish economic advantage.⁶⁰

Cohen's interests, however, are broad, and subtly articulated.⁶¹ Our focus herein is on merely one claim that is fundamental to moral theory in general and human rights theory in particular. Specifically, Cohen argues that the most basic normative or moral principles cannot be justified by an appeal to any ordinary facts or circumstances, even on a broad understanding of what counts as "facts."⁶² We consider this issue not in order to try to resolve it, but to again illustrate the increasing range of uncertainties underlying the very idea of human rights.

In this respect, Cohen asks us to start with any principle we might choose that is thought to be justified only when certain facts or circumstances hold, but not otherwise. But we can then ask why this is so. Some further principle must be invoked to explain why the earlier principle is justified only under certain factual circumstances. And the second, explanatory principle may admittedly also be based in part on certain facts. But eventually, Cohen thinks, our line of justification must reach some ultimate normative principle that is independent of and does not rely for its justification on any non-normative facts.⁶³

Cohen recognizes that many of us think that even the most general human rights principles must in some way reflect or be sensitive to some basic facts.⁶⁴ This is certainly not to accept the factual status quo, entrenched power relationships, or privileges that may be widely taken for granted. Instead Cohen argues that "a principle can reflect or respond to a fact only because it is also a

59. Rawls' difference principle, a secondary element of his theory of justice, requires, at the level of the "basic structure" of society, that inequalities in basic goods including income be arranged so that any inequalities maximize the absolute stock of such goods available to the worst-off persons in that society. See JOHN RAWLS, *A THEORY OF JUSTICE* 76 (1971). For an earlier critique of the difference principle as variously insufficiently-egalitarian, see R. George Wright, *The High Cost of Rawls' Inegalitarianism*, 30 W. POL. Q. 73 (1977). See also JOHN RAWLS, *THE LAW OF PEOPLES* 116, 158-59 (1999).

60. See COHEN, *supra* note 57, at 7-8. For discussion, see, for example, Kok-Chor Tan, *A Defense of Luck Egalitarianism*, 105 J. PHIL. 665 (2008), as well as the contributions of Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989) and Richard J. Arneson, *Justice Is Not Equality*, in JUSTICE, EQUALITY AND CONSTRUCTIVISM: ESSAYS ON G.A. COHEN'S *RESCUING JUSTICE AND EQUALITY* 5 (Brian Feltham ed., 2009).

61. See, for example, the particular reflections in G.A. COHEN, *IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH?* 120 (2000).

62. See COHEN, *supra* note 57, at 229-73; Thomas Pogge, *Cohen to the Rescue!*, in JUSTICE, EQUALITY AND CONSTRUCTIVISM, *supra* note 60, at 88-109; see also Jon Mandle, Book Review, *NOTRE DAME PHIL. REV.* available at <http://ndpr.nd.edu/review.cfm?id=16945>; Ingrid Robeyns, *Review*, 120 ETHICS 156 (2009).

63. See COHEN, *supra* note 57, at 232, 237, 291; Pogge, *supra* note 62, at 103.

64. See COHEN, *supra* note 57, at 231.

response to a [further or deeper] principle that is not a response to a fact.”⁶⁵

This does not seem to be true of all principles outside of morality and human rights. Suppose we keep pressing someone as to why they are mowing someone else’s lawn. They respond that money is involved, and then the consumption of ice cream, with due concerns for cost and health. Finally we are reduced to asking the person, who as a matter of subjective taste prefers chocolate, why they have on this occasion chosen chocolate. If the person at this stage has not run out of (non-moral) principles, he or she might say that under these (or relevantly similar) circumstances, one can reasonably indulge one’s strongest current subjective taste in ice cream.

But even this principle implicitly includes reference to facts and circumstances, including distinguishing flavors, aromas, consistencies, and illustrating that taste can cause pleasure, and in different degrees. One need not, thankfully, rely on some sort of idea of betterness-of-chocolate that holds under all imaginable circumstances.

These relevant facts about persons, tastes, and pleasures could have been different, in which case whatever (non-moral) principles we might have held would likely require modification. And it is hard to see how shifting the focus to human rights principle removes the ultimate dependence of the most basic human rights principles on general facts and circumstances.

Human rights principles, even at some ultimate level, seem to depend for their normative force, and even for their meaning, on various sorts of facts regarding scarcity, limitations of resources, human vulnerabilities and insufficiencies, the need for cooperation and communication for certain tasks, varying levels of human interests and aspirations, and so on. The morality and law of human rights, even at the most basic level, would look different if these basic facts and circumstances were different.

Now, it may be possible to aggregate any of the above basic principles, along with all the relevant facts and circumstances, into one grand—if realistically unusable—principle, and then assert that this inarticulable compound normative principle, incorporating all the relevant facts, is itself not dependent upon any further, yet unassimilated facts. But one would then be left to wonder about the significance, in theory or practice, of the meaningfulness of an inexpressible, pages-long principle.

But if Cohen is even arguably right about an obviously important matter here,⁶⁶ we have yet another example of the increasing fragmentation and controversiality of the very idea of human rights.

VI. SANDEL, RESPONSIBILITY, AND THE GHOSTS OF METAPHYSICS

Michael J. Sandel’s popular course-based book on justice is already

65. *Id.* at 232 (emphasis omitted).

66. The relevant idea of sensitivity of a principle to facts may be ambiguous. See POGGE, *supra* note 62, at 93.

something of an academic phenomenon, spawning its own website,⁶⁷ Facebook page,⁶⁸ PBS television series,⁶⁹ and a Today show promotion “sandwiched between a cooking demonstration and a segment on a turtle named Lucky.”⁷⁰ The book’s primary emphasis is on substantive or normative ethics,⁷¹ with only modest attention paid explicitly to the theory of human rights, or to metaethical issues in general. We can, however, briefly note Sandel’s discussion of utilitarianism, and its implications for human rights, and conclude with a bit of speculation about more metaphysical matters.

It has, of late, been argued that a focus on welfare or utility offers theoretical and practical advantages over a continuing focus on human rights.⁷² Sandel points to some standard critical responses to relying on utilitarianism. Only contingency, or chance, links maximizing utility, even over the long run, and the basic rights of innocent victims.⁷³ However we think of utility or welfare maximization,⁷⁴ there can be no guarantee—in the sense that an absolutist⁷⁵ human rights norm provides a theoretical guarantee—against any authorized violation of evidently basic rights. In contrast, it is also possible that forms of utilitarianism that do not explicitly refer to human rights might, in practice, wind up protecting human rights more effectively than any explicit regime of human

67. Harvard University’s Justice with Michael Sandel, <http://justiceharvard.org/> (last visited Oct. 2, 2009).

68. Readily befriendable under the search query Michael Sandel on Justice.

69. See Patricia Cohen, *Morals Class Is Starting: Please Pass the Popcorn*, N.Y. TIMES, Sept. 26, 2009, at C1.

70. *Id.*

71. In general, asking students to evaluate the moral behavior, say of actors in an economic market, before studying the perhaps less superficially interesting theory and operation of regulated and unregulated markets, carries some predictable risks.

72. See POSNER, *supra* note 2. For general commentary on utilitarianism with human rights implications, see sources cited *supra* notes 25-27. Classically, see the debate between J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973). While we cannot summarily critique Eric Posner’s approach, *supra*, the advantages claimed for focusing on well-being rather than on human rights are unclear. For one thing, the two concepts typically overlap, and human rights still, as of now, carries more evocative and motivational force as rhetoric. There is also likely to be a tradeoff between the verifiability of compliance with welfare norms and the claimed fairness or feasibility of compliance. It is just as easy to blame outsider misconduct and unfairness for internal economic performance as for internal human rights violations. Also, some human rights theories allow for defeasibility and for practicalities and tradeoffs. See GRIFFIN, *ON HUMAN RIGHTS*, *supra* note 48. The popularity of enforceable human rights as well as welfare norms largely depends on the level of generality at which each is formulated. But all of this may be fairly debated.

73. See MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 50-51 (2009).

74. See Lyons, *supra* note 25.

75. For a debate over moral absolutism, see Patrick Hawley, *Moral Absolutism Defended*, 105 J. PHIL. 273 (2008); Frank Jackson & Michael Smith, *Absolutist Moral Theories and Uncertainty*, 103 J. PHIL. 267 (2006).

rights.⁷⁶

As hazy as these considerations may be, Sandel leaves us with much to think about, little ultimate clarity, in the area of the metaphysics of ethics and of human rights. Consider Sandel's earlier book on ethics and biotechnology.⁷⁷ There, Sandel argues that "eugenics and genetic engineering . . . represent the one-sided triumph of willfulness over giftedness, of dominion over reverence, of molding over beholding,"⁷⁸ and a loss of "our sense of giftedness[.]"⁷⁹ This is a fascinating and academically unusual language. Sandel immediately argues that these concerns need not be accounted for in religious terms;⁸⁰ they can apparently have a sufficient, independent, and self-standing "secular" justification as well.⁸¹

Sandel rightly points out that the loss of a "sense of giftedness"—imagine a future child as a genetically custom-designed consumer product—implicates "humility, responsibility, and solidarity,"⁸² and thus potentially the scope and meaning of human rights.⁸³ For our purposes, we should point out that familiar theories of human rights depend, ultimately, on our beliefs about human responsibility falling within only a narrow "middle" portion of the much broader possible range of beliefs about human responsibility. Persons must bear neither too little, nor too much, responsibility for a viable and full human rights regime. Let us briefly explore this idea.

At both extremes of the idea of responsibility, the logic and motivation of at least some human rights must eventually dissolve. This is true even if we continue to use the same human rights terminology, evacuated of its traditional meaning. If, toward one end of the spectrum, we adopt a materialist view of the world, confined largely to some combination of determinism and randomness, we may continue to use the terminology of responsibility and human rights, but those ideas would eventually become a corsage, rather than a living, rooted plant.⁸⁴

76. This possibility would mirror the idea that we may not best achieve happiness, or maximize utility, by consciously and explicitly aiming at happiness or a utility maximization.

77. MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* (2007) [hereinafter SANDEL, *THE CASE AGAINST PERFECTION*]; see also Michael J. Sandel, *The Case Against Perfection*, ATLANTIC, Apr. 2004, available at <http://www.theatlantic.com/doc/200404/sandel>.

78. See the book version of SANDEL, *THE CASE AGAINST PERFECTION*, *supra* note 77, at 85.

79. *Id.*

80. *Id.* at 85-86.

81. See *id.* at 86.

82. *Id.* at 85-86.

83. For some background speculation, see R. George Wright, *Personhood 2.0: Enhanced and Unenhanced Persons and the Equal Protection of the Laws*, 23 QUINNIPIAC L. REV. 1047 (2005).

84. Of course, some persons and groups may continue to have various self-interested reasons for continuing to talk of human rights. For a dramatic formulation of contemporary materialism, consider: "[a] few years ago, Stephen Hawking summed up scientists' prevailing attitude toward the status of life in the universe. 'The human race is just a chemical scum on a moderate-sized planet.'" PAUL DAVIES, *COSMIC JACKPOT: WHY OUR UNIVERSE IS JUST RIGHT FOR LIFE* 222 (2007)

Too little meaningful responsibility and related ideas, and the meaning and motivational force of human rights must eventually wither.

But consider the other end of the range of possibilities about responsibility. If the scope of the genuine freedom, autonomy, and control⁸⁵ of persons really expands beyond a certain point, each of us becomes largely responsible for our own outcomes, given the risks we have genuinely freely chosen to run. Thus, as our personal and group responsibility expands, the logic and motivation for those human rights focused on solidarity, fraternity, and material equality of outcome would tend to dissolve.⁸⁶

What is left unclear is why Sandel would regret the loss of solidarity—the pharmacology of minimizing the pains of empathy should by then be well-developed—if genuine freedom, autonomy, and personal control really do expand along with our personal responsibility. Is Sandel’s regret mainly a matter of a fear that we will sometimes mistakenly find personal responsibility where none really exists? Or is this mainly just a matter of empathy, of compassion for human weakness, suffering, or regretted outcomes, however genuinely freely and responsibly bad outcomes were risked? We may certainly share such a response, but compassion for freely and responsibly risked disappointments hardly seems an adequate basis for a responsive human right.

Ultimately, Sandel’s thinking, along with that of the preceding authors reviewed, each in their diverse ways, inadvertently illustrates the fragility, fragmentation, and continuing disintegration of the contemporary idea of human rights.

VII. CHARLES R. BEITZ’S PRACTICE-ORIENTED APPROACH TO THE IDEA OF HUMAN RIGHTS

Charles R. Beitz has been reflecting on the theory and practice of human rights for some time.⁸⁷ Professor Beitz begins with the observation that the increasing prominence of the idea of human rights has not made “any more clear what kinds of objects human rights are supposed to be.”⁸⁸ Briefly, Beitz’s main thesis is that “human rights” is “not so much an abstract normative idea as an emergent political practice.”⁸⁹

(quoting DAVID DEUTSCH, *THE FABRIC OF REALITY* 177-78 (1997)). For an introduction to some contending views on free will and responsibility, see JOHN MARTIN FISCHER ET AL., *FOUR VIEWS ON FREE WILL* (2007).

85. No doubt freedom, autonomy, and control could easily be counted as human rights themselves, but it is at best unclear that they exhaust the scope of all recognized human rights.

86. Most clearly, “luck egalitarianism” no longer asks much if the only (bad) luck we encounter is the result of risks we have genuinely freely chosen to run. See sources cited *supra* note 60. For some complications, see Wright, *supra* note 83.

87. For one brief prior account, now revised and expanded, see Charles Beitz, *What Human Rights Mean*, 132 *DAEDALUS* 36 (2003).

88. CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS*, at xi (2009).

89. *Id.* at xii.

The gist of his position is that we should look primarily to international practice and to function rather than looking to the broad family of natural rights or natural law theories for basic normative and conceptual guidance.⁹⁰ A bit more elaborately, Beitz focuses on the developing, maturing, critiquable, partly controversial global discourse and practice of human rights, with its various actors, levels, stages, and other complications, and with an eye toward the presumably most-persuasive interpretations of those various interests we deem, perhaps from beneficence, to be most valuable and important.⁹¹

Professor Beitz thus rejects a “foundationalist” approach: “[H]uman rights need not be interpreted as deriving their authority from a single [or plural, actually], more basic value or interest such as those of human dignity, personhood, or membership.”⁹² Such approaches are said to be inevitably misleading as to the grounds, scope, and implementation of human rights.⁹³

One problem with this critical claim is that the vast range and diversity of the evolving natural right and natural law, or other foundationalist approaches to what we now call human rights must almost guarantee for most critiques will be largely true of some such approaches, partly true of others, and almost entirely untrue of yet others. For example, far from deferring to the propertied classes mainstream doctrines from the Middle Ages through Immanuel Kant can be hair-raisingly bold in their direct redistributive and legal implications compared to today’s standards.⁹⁴

The continuing role of the broad family of natural right and natural law approaches to human rights is subject to reasonable contest. Certainly, the 1948 Universal Declaration of Human Rights itself makes only briefly stated, unelaborated metaphysical commitments as to the nature of human rights.⁹⁵ But this hardly reflects a consensus post-metaphysical turn among the delegates. Rather, the breadth and variety of metaphysical and political commitments among the delegates naturally suggested an attempt to set aside as much as possible the question of the nature and justification of human rights, for the sake of a consensus document.

But this lack of consensus, again, can hardly guarantee that individual and collective human rights actors need not depend today, and in the future, on their residual, or even abandoned, metaphysical commitments. Some sort of metaphysics may be necessary for meaningful normative guidance of the practice

90. *See id.* at 7-9.

91. *See id.* at 7-12.

92. *Id.* at 128.

93. *See id.* at 51.

94. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA II-II, question 66, art. 7, *responso* (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (Kevin Knight online ed. 2008), available at <http://www.newadvent.org/summa/306607.htm>); *see also* ST. BONAVENTURE, *The Life of St. Francis*, in THE SOUL’S JOURNEY INTO GOD, THE TREE OF LIFE, THE LIFE OF ST. FRANCIS 177, 254 (Ewert Cousins trans., Paulist Press ed. 1978) (1263); IMMANUEL KANT, EDUCATION § 98, at 105 (Annette Churton trans., Univ. Michigan Press 1964) (1803).

95. *See* BEITZ, *supra* note 88, at 8.

of human rights. In the long run, metaphysics—the deeper “why” questions and their answers—may also be necessary to motivate the sacrifices sometimes called for by human rights, as human rights are commonly understood. In the end, whether which we can develop a worthy and sustainable international and global system of human rights by foregrounding practice and backgrounding, or even setting aside, the broad evolving family of natural rights and natural law theories is yet another unresolved matter of increasing contest and controversy.⁹⁶

96. For a further recent discussion of a more political, as opposed to natural rights-oriented approach to human rights, see Kenneth Baynes, *Toward a Political Conception of Human Rights*, 35 PHIL. & SOC. CRITICISM 371 (2009).