January 14, 2008

The attached two papers are for discussion at the January 28th session of the **Law and Philosophy** seminar at Georgetown Law.

The first paper (*Morality and Normativity*) is the principal paper for discussion. In the second paper (*Liberal Democracy and Human Rights*), which contains some material in the first paper, these are the (few) pages I would like you to be familiar with: 1-3 & 10-13.

Michael Perry

MORALITY AND NORMATIVITY[1]

Michael J. Perry[2]

> The masses blink and say: "We are all equal. - Man is but man, before God - we are all equal." Before God! But now this God has died.
>
> --Friedrich Nietzsche[3]

> Few contemporary moral philosophers . . . have really joined battle with Nietzsche about morality. By and large we have just gone on taking moral judgements for granted as if nothing had happened. We, the philosopher watchdogs, have mostly failed to bark . . .
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> --Philippa Foot[4]

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[1] c 2008, Michael J. Perry. Forthcoming in a symposium on the work of John Finnis to be published in *Legal Theory*. I am grateful to many persons in many venues for helpful comments. My deepest debt, for countless hours of probing, clarifying discussion, is owed to Chris Eberle, Steve Smith, and George Wright. Much of this Essay borrows from, revises, and develops the first part of my book *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press 2007); see pp. 3-29 & 144-73.

[2] Robert W. Woodruff Professor of Law and Senior Fellow, Center for the Study of Law and Religion, Emory University.

[3] This passage--quoted in George Parkin Grant, English Speaking Justice 77 (1985)--appears in Nietzsche's *Thus Spoke Zarathustra*, Part IV ("On the Higher Man"), near the end of section 1.

[4] Natural Goodness 103 (2001).

I. Preliminaries

As we all know, there is not just one morality in the world; there are many.[5] By a "morality", I mean a claim or set of claims about kind of life one should live, where "one" is

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[5] Many moral philosophers write as if there were just one morality--or, at least, just one correct understanding of the term "morality". (They do this, no doubt, because many moral philosophers share an understanding of the term. See Jean Porter, "Christian Ethics and the Concept of Morality: An Historical Inquiry," 26 J. Society of Christian Ethics 3, 4 (2006).) Three examples:

First: Some write about "the moral point of view" as if there were just one moral point of view. For example, in commenting on "that sort of impartiality that constitutes the moral point of view", James Griffin has written that "[w]e all agree that to look at things morally is to look at them, in some sense or other, impartially, granting every person some sort of equal status. Of course, we should have to make this notion of equal status more determinate--say through one interpretation or other of the Ideal Observer or Ideal Contractor. In any case, principles of equality can be principles of impartiality in this sense: they can express the spirit with which one will, if one is moral, consider the facts of the matter." James Griffin, Well-Being 239 (1987). As Bernard Williams observed, "[i]t is often thought that no concern is truly moral unless it is marked by this universality. For morality, the ethical constituency is always the same: the universal constituency. An allegiance to a smaller group, the loyalties to family or country, would have to be justified from the outside inward, by an argument that explained how it was a good thing that people should have allegiances that were less than universal." Bernard Williams, Ethics and the Limits of Philosophy 14 (1985).

Second: Some address the question "Why be moral?" as if there were just one thing it means to be moral. See, e.g., Peter Singer, Practical Ethics 314-35 (2d ed. 1993). Singer writes that the "why be moral" question

> is a question about the ethical point of view, asked from a position outside it. But what is "the ethical point of view"? I have suggested that a distinguishing feature of ethics is that ethical judgments are universalisable. Ethics requires us to go beyond opur own personal point of view to a standpoint like that of the impartial spectator who takes a universal point of view.

Id. at 317.

Third: Some argue that morality is a "myth" (or worse) as if there were just one morality. See, e.g., Richard Joyce, The Myth of Morality (2001). Cf. Brian Leiter, "Morality Critics," in Brian Leiter & Michael Rosen, eds., The Oxford Handbook of Continental Philosophy --- (2008). Relatedly, some opine about the biological and/or social determinants of morality as if there were just one morality. See, e.g., Richard Joyce, The Evolution of Morality (2006).

some or all human beings and "should" means "has conclusive reason to".[6] (By "the kind of life one should live", I mean to include "the kind of person one should be" and "the kind of choices one should, and should not, make".) The morality Adolph Hitler espoused is radically different from the morality Mahatma Ghandi espoused; nonetheless, each is a morality.[7] "Hitler's 'morality' is *not* a morality," you reply, "because it is, to put it mildly, false. There is only one true morality, and Hitler's--least of all Hitler's--is not it!" But to say that there are many moralities is to say nothing about whether a particular morality--or indeed any morality--is true. (Moral skepticism, properly understood, is the position not that morality is false--again, there is not just one morality--but that *every* morality is false, that *every* claim or set of claims about the kind of life one should live is false.) There are many moralities--and the morality Hitler espoused is one of them.

> Asking oneself "Should I care about others?" is not a question prior to moral thought nor a question about morality, but is rather a question *within* morality. Hate and envy are as much "moral" emotions as love and sympathy. Another way to see this is to note that we should consider immoral judgments as a subset of moral judgments; bad moral values as a subset of moral value; false moral theories . . . are still moral theories about how to live.[8]

Of course, just as one can acknowledge that there are many moralities and reject every one of them as false, one can acknowledge that there are many moralities and accept a particular morality as true--accept as true, that is, the claim that one has conclusive reason to live a certain kind of life.

A morality may purport to be true for all human beings, by claiming that all human beings have conclusive reason to live the kind of life it claims all human beings should live. Or a morality may purport to be true only for some human beings. Either way, a morality may be false in one sense but partly true in another: Some, but only some, of the human beings for whom the morality purports to be true may have conclusive reason to live the kind of life the morality claims they should live. Conceivably, two (or more) moralities may both be true, or both be partly true, in this sense: One morality may be true for those, or for some of those, for whom it purports to be true, and another morality may be true for those, or for some of those, for whom it purports to be true.

Notice that it would beg the question to say to someone that the conclusive reason she has for living the kind of life a morality claims she should live is just that that kind of life is

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[6] Cf. Stephen Darwall, The Second-Person Standpoint: Morality, Respect, and Accountability 26 (2006): "[M]oral obligations always give agents conclusive reasons for acting that outweigh or take priority over any potentially competing considerations; or, at least, that always purport to do so."

[7] See Claudia Koonz, The Nazi Conscience (2003).

[8] Paul Bloomfield, Book Review, 116 Mind 176, 178 (2007) (reviewing Joyce, The Evolution of Morality, n. #).

(for her) moral: The question is precisely whether the kind of life the morality claims she should live is (for her) truly moral; she wants to know whether in fact she has conclusive reason to live the kind of life the morality claims she should live.

The "ground of normativity" question--as I call it--can be asked about any morality; to ask it about a particular morality is simply to ask whether (and for whom) the morality is true and, if so, why--in virtue of what--it is true. Again, to say that a particular morality is true (for one) is to say that one should live--that one has conclusive reason to live--the kind of life the morality claims one should live; put another way, it is to say that one has conclusive reason to be (become) the kind of person who lives the kind of life the morality claims one should live. So to ask whether a particular morality is true is to ask what conclusive reason one has, if any, to live the kind of life the morality in question claims one should live. To ask the ground-of-normativity question about a particular morality is to ask what grounds the "should" in the morality's claim that one should live a certain kind of life; it is to ask why--in virtue of what--one should live that kind of life.

In the next section of this Essay, I elaborate a particular, and particularly important, morality, which I call the morality of human rights[9] (because, as I'm about to explain, it is the principal articulated morality that underlies the law of human rights[10]). In section III, I ask the gound-of-normativity question about the morality of human rights and then elaborate a religious response. After explaining, in section IV, why one might be skeptical that there is a plausible secular response to the question (i.e., to the question asked about the morality of human rights), I consider, in sections V and VI, some secular responses. Finally, in section VII, I ask what difference it makes if there is no plausible secular response to the ground-of-normativity question.

II. The Morality of Human Rights

Although it is only one morality among many, the morality of human rights has become the dominant morality of our time; indeed, unlike any morality before it, the morality of human rights has become a truly global morality.[11] (Relatedly, the language of human

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[9] See Perry, Toward a Theory of Human Rights, n. #, at 3-6.

[10] On the precise relationship between the morality of human rights and the law of human rights, see id. at 33-36.

[11] This is not to say that the morality of human rights is new; in one or another version, it is a very old morality. See Leszek Kolakowski, Modernity on Endless Trial 214 (1990):

> It is often stressed that the idea of human rights is of recent origin, and that this is enough to dismiss its claims to timeless validity. In its contemporary form, the doctrine is certainly new, though it is arguable

rights has become the moral *lingua franca*.[12]) Nonetheless, the morality of human rights is not well understood.

What does the morality of human rights hold? The International Bill of Rights, as it is informally known, consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[13] The Universal Declaration refers, in its preamble,

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> that it is a modern version of the natural law theory, whose origins we can trace back at least to the Stoic philosophers and, of course, to the Judaic and Christian sources of European culture. There is no substantial difference between proclaiming "the right to life" and stating that natural law forbids killing. Much as the concept may have been elaborated in the philosophy of the Enlightenment in its conflict with Christianity, the notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality.

Nonetheless, the emergence of the morality of human rights in international law, in the period since the end of World War II, is a profoundly important development: "Until World War II, most legal scholars and governments affirmed the general proposition, albeit not in so many words, that international law did not impede the natural right of each equal sovereign to be monstrous to his or her subjects." Tom J. Farer & Felice Gaer, "The UN and Human Rights: At the End of the Beginning," in Adam Roberts & Benedict Kingsbury, eds., United Nations, Divided World 240 (2d ed. 1993).

[12] See Jürgen Habermas, Religion and Rationality: Essays on Reason, God, and Modernity 153-54 (Eduardo Mendieta, ed., 2002): "Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victim of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity."

[13] The Universal Declaration was adopted and proclaimed by the General Assembly of the United Nations on Dec. 10, 1948. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which are treaties and as such are binding on the several state parties thereto, were meant, in part, to elaborate the various rights specified in the Universal Declaration. The ICCPR and the ICESCR were each adopted and opened for signature, ratification, and accession by the General Assembly of the United Nations on Dec. 16, 1966. The ICESCR entered into force on Jan. 3, 1976, and as of June 2004 had 149 state parties. The ICCPR entered into force on Mar. 23, 1976, and as of June 2004 had 152 state parties. The United States is a party to the ICCPR but not to the ICESCR. In October 1977, President Jimmy Carter signed both the ICCPR and the ICESCR. Although the United States Senate has not ratified the ICESCR, in September 1992, with the support of President George H. W. Bush, the Senate ratified the ICCPR (subject to certain "reservations, understandings and declarations" that are not relevant here; see 138 Cong. Rec. S 4781-84 (daily ed. Apr. 2, 1992)).

to "the inherent dignity . . . of all members of the human family" and states, in Article 1, that "[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood." The two covenants each refer, in their preambles, to "the inherent dignity . . . of all members of the human family" and to "the inherent dignity of the human person"--from which, the covenants insist, "the equal and inalienable rights of all members of the human family . . . derive."[14]

According to the International Bill of Rights, then, and also according to the constitutions of many liberal democracies,[15] the morality of human rights consists of a twofold claim. The first part of the claim is that *each and every (born) human being has equal inherent dignity.*[16]

> **o** *The Oxford English Dictionary* gives this as the principal definition of "dignity": "The quality of being worthy or honourable; worthiness, worth, nobleness, excellence."[17]

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[14] The relevant wording of the two preambles is as follows:

> *The State Parties to the present Covenant,*
>
> *Considering* that . . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.
>
> *Recognizing* that these rights derive from the inherent dignity of the human person.
>
> . . .
>
> *Agree* upon the following articles: . . .

[15] See David Kretzmer & Eckart Klein, eds., The Concept of Human Dignity in Human Rights Discourse v-vi, 41-42 (2002); Mirko Bagaric & James Allan, "The Vacuous Concept of Dignity," 5 J. Human Rights 257, 261-63 (2006). See also Vicki C. Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse," 65 Montana L. Rev. 15 (2004).

[16] As a descriptive matter, the morality of human rights holds not that every human being has inherent dignity, but only that every *born* human being has inherent dignity. See Perry, Toward a Theory of Human Rights, n. #, at 54. Except when discussing abortion, I generally bracket the born/unborn distinction and say simply that according to the morality of human rights, every human being has inherent dignity. I argue elsewhere that we who affirm that every born human being has inherent dignity have good reason to affirm as well that every unborn human being has inherent dignity. See id., chapter 4.

[17] Oxford English Dictionary (2d ed. 1991).

o To say that every human being has "inherent" dignity is to say that the fundamental dignity every human being possesses, she possesses *not* as a member of one or another group (racial, ethnic, national, religious, etc.), *not* as a man or a woman, *not* as someone who has done or achieved something, and so on, *but simply as a human being*.[18]

o To say that every human being has "equal" inherent dignity is to say that, like being pregnant, being "inherently dignified" is not a condition that admits of degrees: Just as no pregnant woman can be more--or less--pregnant than another pregnant woman, no human being can have more--or less--inherent dignity than another human being. According to the morality of human rights, "[a]ll members of the human family are born . . . equal in dignity . . ." Hereafter, when I say "inherent dignity", I mean "equal inherent dignity".

The second part of the claim is that *the inherent dignity of human beings has a normative force for us, in this sense: We should--every one of us--live our lives in accord with the fact that every human being has inherent dignity; that is, we should respect--we have conclusive reason to respect--the inherent dignity of every human being.*[19]

There is another way to state the twofold claim that is the morality of human rights: Every human being has inherent dignity *and is "inviolable"*: not-to-be-violated.[20] According

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[18] The ICCPR, in Article 26, bans "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See Peter Berger, "On the Obsolescence of the Concept of Honor," in Stanley Hauerwas & Alasdair MacIntyre, eds., Revisions: Changing Perspectives in Moral Philosophy 172, 176 (1983): "Dignity . . . always relates to the intrinsic humanity divested of all socially imposed roles or norms. It pertains to the self as such, to the individual regardless of his position in society. This becomes very clear in the classic formulations of human rights, from the Preamble to the Declaration of Independence to the Universal Declaration of Human Rights of the United Nations." Cf. Charles E. Curran, "Catholic Social Teaching: A Historical and Ethical Analysis 1891-Present 132 (2002): "Human dignity comes from God's free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God. . . . Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor, young or old; male or female; healthy or sick."

[19] I say that the morality of human rights consists of a *twofold* claim, rather than that it consists of two claims, as a way of emphasizing that according to the morality of human rights, the claim that every human being has inherent dignity is not an independent claim but is inextricably connected to the further claim that we should lives our lives in a way that respects the inherent dignity of every human being. See n. # [Smith e-mail].

[20] For a general definition of what it means to say that one is "inviolable", see Oxford

to the morality of human rights, one can violate a human being either explicitly or implicitly. One violates a human being *explicitly* if one explicitly denies that she (or he) has inherent dignity. (The Nazis explicitly denied that the Jews had inherent dignity.[21]) One violates a human being *implicitly* if one treats her as if she lacks inherent dignity, either by doing do to her what one would not do to her, or by refusing to do for her what one would not refuse to do for her, if one genuinely perceived her to have inherent dignity. (Even if the Nazis had not explicitly denied that the Jews had inherent dignity, they would have implicitly denied it: The Nazis did to the Jews what no one would have done to them who genuinely perceived the Jews to have inherent dignity.) In the context of the morality of human rights, to say that (1) every human being has inherent dignity and we should live our lives accordingly (namely, in a way that respects that dignity) is to say that (2) every human being has inherent dignity and is inviolable: not-to-be-violated, in the sense of "violate" just indicated. To affirm the morality of human rights is to affirm the twofold claim that every human being has inherent dignity and is inviolable.

If it is true, *why* is it true--*in virtue of what* is it true--that every human being has inherent dignity and is inviolable?[22] That the International Bill of Rights is (famously) silent on that question is not surprising, given the plurality of religious and nonreligious views that existed among those who bequeathed us the Universal Declaration and the two covenants.[23]

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English Dictionary (2d ed. 1991): "not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault."

21 See Michael Burleigh & Wolfgang Wipperman, The Racial State: Germany, 1933-1945 (1991); Johannes Morsink, "World War Two and the Universal Declaration," 15 Human Rights Q. 357, 363 (1993); Koonz, n. #.

22 Cf. Jeff McMahan, "When Not to Kill or Be Killed," Times Lit. Supp., Aug. 7, 1998, at 31 (reviewing Frances Myrna Kamm, Morality, Mortality (Vol. II): Rights, Duties, and Status (1997)): "Understanding the basis of our alleged inviolability is crucial both for determining whether it is plausible to regard ourselves as inviolable, and for fixing the boundaries of the class of inviolable beings."

23 See Jacques Maritain, "Introduction," in UNESCO, Human Rights: Comments and Interpretation 9-17 (1949). Maritain wrote: "[W]e agree about the rights but on condition that no one asks us why." Id. at 9. (See also Youngjae Lee, "International Consensus as Persuasive Authority in the Eighth Amendment," http://ssrn.com/abstract=959706 (2007): "International human rights treaties are . . . willfully silent about the reasons behind the norms that they adopt.") However, Maritain was wrong: There was agreement *both* about "the rights" (actually, about *some* rights) *and* about a part of the "why": namely, that every human being has inherent dignity. Again, the Declaration explicitly refers, in its preamble, to "the inherent dignity . . . of all members of the human family" and states, in Article 1, that "[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood." So what Maritain should have said was this: "We agree about the rights. We even agree about the inherent dignity--but on condition that no one asks us *why* every human being has inherent dignity."

Indeed, the claim that every human being has inherent dignity and is inviolable is deeply problematic for many secular thinkers, because the claim is difficult--perhaps to the point of impossible--to align with one of their fundamental convictions, what Bernard Williams called "Nietzsche's thought": "[T]here is, not only no God, but no metaphysical order of any kind . . ."[24]

III. The "Ground of Normativity" Question:

A Religious Response

> 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, for it shapes our thoughts about the way in which human beings limit our will as does nothing else in nature. 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. Be that as it may: each of them is problematic and contentious. Not one of them has the simple power of the religious ways of speaking.
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> Where does that power come from. Not, I am quite sure, from esoteric theological or philosophical elaborations of what it means for something to be sacred. It derives from the unashamedly anthropomorphic character of the claim that we are sacred because God loves us, his children.
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> --Raimond Gaita[25]

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[24] Bernard Williams, "Republican and Galilean," New York Rev., Nov. 8, 1990, at 45, 48 (reviewing Charles Taylor, Sources of the Self: The Making of Modern Identity (1989)). Cf. John M. Rist, Real Ethics: Rethinking the Foundations of Morality 2 (2002): "[Plato] came to believe that if morality, as more than 'enlightened' self-interest, is to be rationally justifiable, it must be established on metaphysical foundations . . ."

[25] Raimond Gaita, A Common Humanity: Thinking about Love and Truth and Justice 23-24 (2000). Cf. Jürgen Habermas, Religion and Rationality: Essays on Reason, God, and Modernity 162 (Eduardo Mendieta, ed., 2002): "[T]he basic concepts of philosophical ethics, as they have developed up to this point, also fail to capture all the intuitions that have already found a more nuanced expression in the language of the Bible, and which we have only come

I said that the ground-of-normativity question can be asked about any morality. Let's ask it about the morality of human rights: Is the morality of human rights true (or at least partly true); do we (or at least some of us) have conclusive reason to live the kind of life the morality of human rights claims that we--every one of us--should live: *a life in which we strive never to violate any human being, never to treat any human being as if she lacks inherent dignity; a life in which we strive always to respect the inherent dignity of every human being?*[26]

In this section, I elaborate an affirmative religious response--in particular, a Christian response--to the question. Of course, no one who is not a religious believer will find the response plausible; indeed, even many who *are* religious believers will not find the response plausible. Nonetheless, the religious (Christian) response I am about to elaborate is a intelligible, coherent response to the ground-of-normativity question, a response that for many religious believers is conclusive reason to live the kind of life the morality of human rights claims they (and we) should live.

Imagine a religious believer named Sarah. Although she is a Christian, Sarah is sufficiently familiar with Judaism and Islam to know that her religious religious response to the ground-of-normativity question, which she is about to elaborate, is not one that just Christians (not all Christians, but many) affirm;[27] many religious Jews and Muslims affirm it too.[28] So,

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to know by means of a halfway religious socialization."

[26] I have argued elsewhere that we violate a human being even if all we do is decline to do what we can, all things considered, to prevent another human being from violating her or from otherwise causing her unwarranted suffering. See Perry, Toward a Theory of Human Rights, n. #, at 33-36.

[27] Charles Taylor has written that the "affirmation of universal human rights" that characterizes "modern liberal political culture" represents an "authentic development[] of the gospel . . ." Charles Taylor, A Catholic Modernity? 16 (1999). Taylor writes "that modern culture, in breaking with the structures and beliefs of Christendom, also carried certain facets of Christian life further than they ever were taken or could have been taken within Christendom. In relation to the earlier forms of Christian culture, we have to face the humbling realization that the breakout was a necessary condition of the development." Id. For Taylor's development of this point, with particular reference to modern liberal political culture's affirmation of universal human rights, see id. at 18-19. Cf. Charles Taylor, "Closed World Structures," in Mark A. Wrathall, ed., Religion after Metaphysics 47, 53-54 & 61 (2003).

John Allen, the Vatican correspondent for the *National Catholic Reporter*, has reported that Catholic priest and theologian Martin Rhonheimer, "widely recognized as a provocative and unpredictable thinker," suggested that "once the secular world accepts the universality of human dignity and the bundle of absolute rights it implies, it will sooner or later discover that

notwithstanding her Christian vocabulary and scriptural references, Sarah's religious response is ecumenical as among the three great monotheistic faiths.[29]

Sarah affirms that every human being has inherent dignity and that we should live our lives accordingly. (For a reason that will soon be apparent, Sarah prefers to say that every human being "is sacred". Nonetheless, for Sarah, each predicate--"has inherent dignity", "is sacred"--is fully equivalent to the other; Sarah translates each predicate into the other without remainder.) In affirming this, Sarah affirms the morality of human rights. Predictably, Sarah's affirmation provokes this question: "Why--in virtue of what--does every every human being have inherent dignity?" Sarah gives a religious explanation: Speaking the words of *The First Letter of John*, Sarah says that "God is love." ("Whoever fails to love does not know God, because God is love." 1 John 4:8.[30] "God is love, and whoever remains in love

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the Christian gospel provides the strongest cognitive basis for explaining and defending those rights." John L. Allen, Jr., "The Word From Rome," NCRonline.org, May 5, 2006.

[28] On Islam and the morality of human rights, see Recep Senturk, [complete cite]. See also Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment," in Elizabeth M. Bukar & Barbara Barnett, eds., Does Human Rights Need God? 58 (2005).

On Judaism and the morality of human rights, see Asher Maoz, "Can Judaism Serve as a Source of Human Rights?," 64 Heidelberg J. Int' L. 677 (2004); Michael Lerner, "Jesus the Jew," Tikkun, May/June 2004, at 33:

> Jesus' message of love is . . . an intrinsic part of Torah Judaism . . . It was the Torah, not Jesus, that first taught "Thou shalt love thy neighbor as thyself" and "Thou shalt love the Lord your God with all your heart, with all your soul, and with all your might." It was this same Judaism that taught a truly revolutionary message: "Thou shalt love the stranger (Hebrew: ger, which might also be translated as "The Other" or "the Powerless one," based on the follow-up point made in Torah, "Remember that you were a Ger in Egypt" when the Jewish people were enslaved).

See generally Robert Traer, Faith in Human Rights: Support in Religious Traditions for a Global Struggle (1991).

[29] If we listen carefully to what Sarah is about to say--and if we refrain from imputing to Sarah standard Christian positions on theological issues Sarah does not address, such as the divinity of Jesus--we will not assume that Sarah identifies herself as a Christian in the conventional sense (though for all we know she may).

[30] The translations of biblical passages here and elsewhere in this book are those of *The New Jerusalem Bible* (1985).

remains in God and God in him." 1 John 4:16.)[31] Moreover, God's act of creating and sustaining the universe is an act of love,[32] and we human beings are the beloved children of

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[31] See John D. Caputo, "The Experience of God and the Axiology of the Impossible," in Mark A. Wrathall, ed., Religion after Metaphysics 123, 138 (2003):

> There is no name more closely associated in the Christian Scriptures with "God" than love. That is what God is, and this comes as close as the New Testament does to a "definition" of God, as opposed to defining God onto-theo-logically in terms of possibility and actuality, essence and existence. Even so, it would be at best a quasi-definition because in saying that God is love one is not de-fining God in the sense of setting forth God's limits and boundaries, but saying that God is unbounded and unlimited and unconditional excess, for love is love only in excess and overflow, not in moderation.
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> So the experience of God is given in the experience of love. But love is perfect not when love is drawn around a closed circle of friends and intimates, which makes perfect sense and is perfectly possible, but precisely when love is stretched to the breaking point of loving when love is mad and impossible. The God of love and the God of the impossible seem like a nice fit, a kind of pre-fit.

[32] Simone Weil wrote: "God created through love and for love. God did not create anything except love itself, and the means to love." Simone Weil, Waiting for God 123 (Emma Craufurd, tr., 1951).

Sarah doesn't mean to put much weight on the distinction between (a) God's "creating" and (b) God's "sustaining" the universe. See Brian Davies, "Creationism and All That," The Tablet [London], May 11, 2002, at 16:

> In the thirteenth century, St Thomas Aquinas, though himself believing that the world had a beginning, argued that this is seriously irrelevant to the doctrine of creation. He said that to believe that the world is created is chiefly to believe that its being there at all and at any time is God's doing.
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> And this, too, is what we find biblical authors teaching. . . . In these texts God is intimately involved with the world as its ever-present cause.
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> . . .
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> At the end of his *Tractatus Logico-Philosophicus* Ludwig Wittgenstein wrote: "Not *how* the world is, is mystical, but *that* it is." For Wittgenstein, *how the world is* is a scientific matter with scientific answers (even if we do not have all the answers yet). But, he insists, even when the scientific answers are in, we are still left with the *thatness*

God and sisters and brothers to one another.[33] (As Hilary Putnam has noted, the moral image central to what Putnam calls the Jerusalem-based religions "stresse[s] equality and also fraternity, as in the metaphor of the whole human race as One Family, of all women and men as sisters and brothers."[34]) Every human being has inherent dignity, says Sarah, in the sense that every human being is a beloved child of God and a sister/brother to every other human being.[35] Sarah is fully aware that she is speaking analogically, but that's the best anyone can

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> of the world, the fact *that* it is. And it is with this fact that we surely need to grapple if we are reasonably to arrive at the notion of creation apart from the testimony of scripture.

[33] Cf. Kristen Renwick Monroe, The Heart of Altruism: Perceptions of a Common Humanity 216 (1996).

> [I]t is the [altruistic] perspective itself that constitutes the heart of altruism. Without this particular perspective, there are no altruists. . . . [The perspective] consists of a common perception, held by all altruists, that they are strongly linked to others through a shared humanity. This self-perception constitutes such a central core to altruists' identity that it leaves them with no choice in their behavior toward others. They are John Donne's people. All life concerns them. Any death diminishes them. Because they are a part of mankind.

[34] Hilary Putnam, The Many Faces of Realism 60-61 (1987). In an essay on "The Spirituality of The Talmud", Ben Zion Bokser and Baruch M. Bokser state: "From this conception of man's place in the universe comes the sense of the supreme sanctity of all human life. 'He who destroys one person has dealt a blow at the entire universe, and he who sustains or saves one person has sustained the whole world.'" Ben Zion Bokser & Baruch M. Bokser, "Introduction: The Spirituality of the Talmud," in The Talmud: Selected Writings 7 (1989). They continue:

> The sanctity of life is not a function of national origin, religious affiliation, or social status. In the sight of God, the humble citizen is the equal of the person who occupies the highest office. As one talmudist put it: "Heaven and earth I call to witness, whether it be an Israelite or pagan, man or woman, slave or maidservant, according to the work of every human being doth the Holy Spirit rest upon him." . . . As the rabbis put it: "We are obligated to feed non-Jews residing among us even as we feed Jews; we are obligated to visit their sick even as we visit the Jewish sick; we are obligated to attend to the burial of their dead even as we attend to the burial of the Jewish dead."

Id. at 30-31.

[35] Cf. Daniel C. Dennett, Darwin's Dangerous Idea: Evolution and the Meanings of Life 474 (1995) (quoting Lee Khan Yew, Senior Minister of Singapore, on the outcry over the sentence of flogging given to Michael Fay for vandalism): "To us in Asia, an individual is an

do, she insists, in speaking about who/what God is[36]--as in "Gracious God, gentle in your power and strong in your tenderness, you have brought us forth from the womb of your being and breathed into us the breath of life."[37]

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ant. To you, he's a child of God. It is an amazing concept."

[36] See Richard P. McBrien, ed., The HarperCollins Encyclopedia of Catholicism 43 (1995):

> **analogy,** A comparison in the form of "A is to B as C is to D," e.g., God is to the world as the artist is to her work."
>
> All theological language is analogous since we can compare God only to the created things we know; we cannot speak of God except in human terms. The Fourth Lateran Council (1215) declared that "No similarity can be found so great but that the dissimilarity is even greater" (DS 806). Thus every similarity between God and creatures (God is wise; humans are wise) is understood to include a greater dissimilarity (God's wisdom is unlike human wisdom in that it infinitely surpasses it). Thomas Aquinas (d. 1274) is particularly well known for developing the role of analogy in theological discourse.

(Not *all* theological language is analogical, however; *some* is negative: e.g, God is not finite, God is not comprehensible.) Continuing to speak analogically, Sarah says that every human being is created "in the image of God." See id. at 654:

> **imago Dei** (Lat., "image of God"), theological concept that denotes the likeness of the human creature to God. According to Gen 1:26, humanity was created "in [God's] image, according to [God's] likeness." Found sparsely in the Hebrew Scriptures, the word "image" was often used in Pauline writings in the NT to interpret Christ's work and became central to early Christian reflections on the human condition, the meaning of redemption in Christ, and hope for humankind. . . .
>
> Early theologians did not consistently separate "image" from "likeness" in interpreting human existence, and they saw the image of God variously in God's intellect, the capacity for moral decision, and the ability to rule over creation; but these theologians usually agreed that it implied a kinship between God and humankind and a call for the imitation of God.

For a discussion of different understandings and uses of the "image of God" language, see Roger Ruston, Human Rights and the Image of God 269-91 (2004).

[37] United Church of Christ, Book of Worship 111 (1983).

Sarah's explanation provokes a yet further question, about the ground of the normativity--of the "should"--in the claim that we *should* live our lives in a way that respects the inherent dignity of every human being: "I'll assume, for the sake of our discussion, that every human being has inherent dignity in the sense that every human being is a beloved child of God and a sister/brother to every other human being. So what? Why should it matter to me--to the way I live my life--that every human being has inherent dignity, that every human being is a beloved child of God and a sister/brother to me? Why should I respect--why should I want to be a person who respects--the inherent dignity of every human being?" In responding to this important question about the ground of normativity, Sarah--who "understands the authority of moral claims to be warranted not by divine dictates but by their contribution to human flourishing"[38]--states her belief that the God who loves us has created us to love one another.[39] (We are created not only to achieve union, in love, with one another; we are also created, Sarah believes, to achieve union, in love, with God. Sarah understands that state to be "not an ontological unity such that either the lover or the beloved ceases to have his own individual existence[, but rather] a unity at the level of affection or will by which one person *affectively* takes the other to be part of himself and the goods of the other to be his own goods."[40]) Given our created nature--given what we have been created *for*--the

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[38] See Jean Porter, Nature as Reason: A Thomistic Theory of the Natural Law 144-45 (2005):

> In the course of reviewing recent work on the biological roots of morality, Stephen Pope contrasts divine command approaches to ethics to the revised natural law theory currently being developed by some contemporary Catholic moral theologians, including himself, observing that this latter approach "understands the authority of moral claims to be warranted not by divine dictates but by their contribution to human flourishing." The Thomistic theory of natural law to be developed here shares in this fundamental approach, insofar as it takes happiness to be the aim of, and correlatively the ultimate criterion for, moral behavior.

(Quoting Stephen Pope, "The Evolutionary Roots of Morality in Theological Perspective," 33 Zygon 545, 554 (1998).)

[39] In e-mail discussion, Steve Smith has characterized Sarah's views this way: "Human fulfillment generally, and my own fulfillment, will be served by learning to love and respect that which is sacred. Human beings are sacred. Therefore, human fulfillment is served by . . . etc." As Smith observes: "In this presentation, the claims that (a) my fulfillment is served by learning to love Bill, Jane, et al. and (b) Bill, Jane, et al. are sacred are hardly independent claims, or independent reasons to care about others . . . Both the 'fulfillment' and the 'sacredness' parts are necessary to the argument. But at the same time, they are not just different phrasings of the same claim." E-mail from Steven Smith to Michael Perry, Aug. 28, 2002.

[40] David M. Gallagher, "Thomas Aquinas on Self-Love as the Basis for Love of Others," 8 Acta Philosophica 23 (1999) (emphasis in original).

most fitting way of life for us human beings, the most deeply satisfying way of life of which we are capable, as children of God and sisters and brothers to one another, is one in which we embrace Jesus' "new" commandment, reported in John 13:34, to "love one another . . . just as I have loved you."[41] By becoming persons of a certain sort--persons who discern one another as bearers of inherent dignity and love one another as such--we fulfill our created nature.[42] "We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death." (1 John 3:14.)[43] Indeed, Sarah believes that in

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[41] For Christians, the basic shape of the good life is indicated by 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." John 13:34. See also John 15:12, 17.

[42] In his book *After Theory* (2003), Terry Eagleton writes that "Aristotle thought that there was a particular way of living which allowed us . . . to be at our best for the kind of creatures we are. This was the life conducted according to the virtues. The Judaeo-Christian tradition considers that it is the life of charity or love. What this means . . . is that we become the occasion of each other's self-realization. It is only through being the means of your fulfillment that I can attain my own." Quoted in David Lodge, "Goodbye to All That," New York Rev., May 27, 2004, at 39, 41.

[43] In the Gospel, there are two great commandments, not one. See Matthew 22:34-40: "But when the Pharisees heard that he had silenced the Sadducees they got together and, to put him to the test, one of them put a further question, 'Master, which is the greatest commandment of the Law?' Jesus said to him, 'You must love the Lord your God with all your heart, with all your soul, and with all your mind. This is the greatest and the first commandment. The second resembles it: You must love your neighbor as yourself. On these two commandments hang the whole Law, and the Prophets too." See also Mark 12:28-34; Luke 10:25-28. Cf. J.L. Mackie, Ethics: Inventing Right and Wrong 243 (1977): "D.D. Raphael, in 'The Standard of Morals', in Proceedings of the Aristotelian Society 75 (1974-75) follows Edward Ullendorff in pointing out that whereas 'Thou shalt love thy neighbor as thyself' represents the Greek of the Septuagint (Leviticus 19:18) and of the New Testament, the Hebrew from which the former is derived means rather 'You shall treat your neighbor lovingly, for he is like yourself.'"

What is the relation between the two commandments? In the view of great German Catholic theologian Karl Rahner, not only is there no tension between the commandment to love God and the commandment to love one another, there is "a radical identity of the two loves." Karl Rahner, 6 Theological Investigations 231, 236 (1969). In his "Reflections on the Unity of the Love of Neighbor and the Love of God", Rahner wrote: "It is radically true, i.e. by an ontological and not merely 'moral' or psychological necessity, that whoever does not love the brother whom he sees, also cannot love God whom he does not see, and that one can love God whom one does not see only *by* loving one's visible brother lovingly." Id. at 247. Rahner's reference is to a passage in John's First Letter in which it is written: "Anyone who says 'I love God' and hates his brother, is a liar, since whoever does not love the brother whom he can see cannot love God whom he has not seen." 1 John 4:20. In Rahner's view, it is only by loving one's neighbor that one has achieves the ontological/existential state of being/consciousness that constitutes "love of God", even though one may not "believe in

some situations, we love most truly and fully--and therefore we live most truly and fully--by taking the path that will probably or even certainly lead to our dying. "No one can have

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God". See Rahner, this n., at 238-39. If Rahner is right, then there is, in the following sense, not two great commandments, but one: Compliance with the first great commandment (to love God) requires compliance with the second (to love one another), and compliance with the second entails compliance with the first. See id. at 232. Consider, in that regard, the Last Judgment passage in Matthew's Gospel:

> When the Son of man comes in his glory, escorted by all the angels, then he will take his seat on his throne of glory. All nations will be assembled before him and he will separate people from one another as the shepherd separates sheep from goats. He will place the sheep on his right hand and the goats on his left. Then the King will say to those on his right hand, "Come, you whom my Father has blessed, take as your heritage the kingdom prepared for you since the foundation of the world. For I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you made me welcome, lacking clothes and you clothed me, sick and you visited me, in prison and you came to see me." Then the upright will say to him in reply, "Lord, when did we see you hungry and feed you, or thirsty and give you drink? When did we see you a stranger and make you welcome, lacking clothes and clothe you? When did we find you sick or in prison and go to see you?" And the King will answer, "In truth I tell you, in so far as you did this to one of the least of these brothers of mine, you did it to me." Then he will say to those on his left hand, "Go away from me, with your curse upon you, to the eternal fire prepared for the devil and his angels. For I was hungry and you never gave me food, I was thirsty and you never gave me anything to drink, I was a stranger and you never made me welcome, lacking clothes and you never clothed me, sick and in prison and you never visited me." Then it will be their turn to ask, "Lord, when did we see you hungry or thirsty, a stranger or lacking clothes, sick or in prison, and did not come to your help?" Then he will answer, "In truth I tell you, in so far as you neglected to do this to one of the least of these, you neglected to do it to me." And they will go away to eternal punishment, and the upright to eternal life.

Matthew 25:31-46. In Matthew's Gospel, these are Jesus' final words to his disciples before the beginning of the passion narrative. Matthew 26:1-2 states: "Jesus had now finished all he wanted to say, and he told his disciples, 'It will be Passover, as you know, in two days' time, and the Son of Man will be handed over to be crucified.'"

It seem to follow, from Rahner's view, that it is a mistake, a confusion, to say that we should love one another *because* we love, or should love, God and God wants us to--or *because* we fear, or should fear, God and God wants us to. We should say, instead, that for us to love one another is also for us to love God--and that we should achieve the ontological/existential state of being/consciousness that constitutes "love of one another" (=

greater love than to lay down his life for his friends." (John 15:13.)[44]

(Sarah also believes that the ultimate fulfillment of our created nature--which, Sarah believes, is mystical union, in love, with God and with one another[45]--can be neither fully achieved nor even fully understood in our earthly life.[46] "Now we see only reflections in a mirror, mere riddles, but then we shall be seeing face to face. Now, I can know only imperfectly; but then I shall know just as fully as I am myself known." (I Corinthians 13:12.) But in our earthly life, Sarah believes, we can make an important beginning.[47])

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"love of God") because that state is the highest human good; to have achieved that radically unalienated condition is to have become *truly*, *fully* human.

[44] Dietrich Bonhoeffer wrote that "when Christ calls us, his call leads to death." Dietrich Bonhoeffer, The Cost of Discipleship 41 (R.H. Fuller, tr., 1995; originally published 1937). Cf. Helmut Gollwitzer et al., Dying We Live: The Final Messages and Records of the Resistance (New York: Pantheon Books, Inc. 1956); Terry Eagleton, "Lunging, Flailing, Mispunching", London Rev. of Books, Oct. 19, 2006) (reviewing Richard Dawkins, The God Delusion (2006)):

> The central doctrine of Christianity . . . is, in the words of the late Dominican theologian Herbert McCabe, that if you don't love you're dead, and if you do, they'll kill you. Here, then, is your pie in the sky and opium of the people. It was, of course, Marx who coined that last phrase; but Marx, who in the same passage described religion as the "heart of a heartless world, the soul of soulless conditions", was rather more judicious and dialectical in his judgment on it than the lunging, flailing, mispunching Dawkins.

[45] Cf. Charles Taliaferro, "Why We Need Immortality," 6 Modern Theology 367 (1990).

[46] See Byron L. Sherwin, "Jews and the World to Come," First Things, June/July 2006, at 13. Cf. Graham Greene, Monsignor Quixote 221 (1982): "The Mayor didn't speak again before they reached Orense; an idea quite strange to him had lodged in his brain. Why is it that the hate of a man--even of a man like Franco--dies with his death, and yet love, the love which he had begun to feel for Father Quixote, seemed now to live and grow in spite of the final separation and the final silence--for how long, he wondered with a kind of fear, was it possible for that love of his to continue? And to what end?"

[47] Compare, to Sarah's eschatological vision, the view of Jürgen Habermas:

> [By confronting] the conscientious question about deliverance for the annihilated victims[,] we become aware of the limits of that transcendence from within which is directed to this world. But this does not enable us to ascertain the *countermovement* of a compensating transcendence from beyond. That the universal covenant of fellowship would be able to be effective retroactively, toward the past, only in the

The "love" in Jesus' counsel to "love one another" is not *eros* or *philia*, but *agape*.[48] To love another in the sense of *agape* is *to see her (or him) in a certain way* (namely, as child of God and sister/brother to oneself) and, therefore, *to act toward her in a certain way*.[49] *Agape* "discloses to us the full humanity of others. To become properly aware of that full humanity is to become incapable of treating it with contempt, cruelty, or indifference. The full awareness of others' humanity that love involves is an essentially motivating perception."[50]

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> weak medium of our memory, of the remebrance oif the living generations, and of the anamnestic witnesses handed down falls short of our moral need. But the painful experience of a deficit is still not a sufficient argument for the assumption of an "absolute freedom which saves in death."

Habermas, n. #, at 80.

[48] The literature in Christian ethics on *agape* is voluminous. Some recent titles include: Colin Grant, Altruism and Christian Ethics (2001); Garth L. Hallett, Christian Neighbor-Love: An Assessment of Six Rival Versions (1989); Stephen J. Pope, The Evolution of Altruism and the Ordering of Love (1994); Edmund N. Santurri & William Werpehowski, eds., The Love Commandments: Essays in Christian Ethics and Moral Philosophy (1992); Edward Collins Vacek, SJ, Love, Human and Divine: The Heart of Christian Ethics (1994); Timothy P. Jackson, Love Disconsoled: Meditations on Christian Charity (1999); André Comte-Sponville, A Small Treatise on the Great Virtues 222-90 (Catherine Temerson, tr., 2001); Timothy P. Jackson, The Priority of Love: Christian Charity and Social Justice (2003).

[49] For Sarah, to love another, in the sense of *agape*, is not to *feel* a certain way but to *act* in a certain way. Cf. Jeffrie G. Murphy, "Law Like Love," 55 Syracuse L. Rev. 15, 21 (2004):

> There are, of course, many fascinating questions that can be asked about the love commandment. Does it command love as an emotion or simply that we act in a certain way? Kant, convinced that we can be morally bound only to that which is in our control, called emotional love pathological love and claimed that it could not be our duty to feel it. What is actually commanded he called practical love--which is simply acting morally as Kant conceived acting morally.

Murphy explained to me in discussion that by "pathological" (which is the English word commonly used to translate the German word Kant used) Kant did not mean diseased or sick but simply something from our passions with respect to which we are passive and thus not in voluntary control.

[50] Timothy Chappell, Book Review, 111 Mind 411, 412 (2202) (reviewing Gaita, n. #). Chappell is here describing "Gaita's view" and says that it is "reminiscent of course of

The "one another" in Jesus' counsel is radically inclusive: "You have heard how it was said, You will love your neighbor and hate your enemy. But I say this to you, love your enemies and pray for those who persecute you; so that you may be children of your Father in heaven, for he causes his sun to rise on the bad as well as the good, and sends down rain to fall on the upright and the wicked alike. . . . You must therefore set no bounds to your love, just as your heavenly Father sets none to his." (Matthew 5:43-48.)[51]

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Simone Weil and Iris Murdoch." Id. See Gaita, n. #, at xxxiii:

> Iris Murdoch said that understanding the reality of another person is a work of love, justice and pity. She meant, I believe, that love, justice and pity are *forms* of understanding rather than merely conditions that facilitate understanding--conditions like a clear head, a good night's sleep, an alcohol-free brain. Real love is hard in the sense of hardheaded and unsentimental. In ridding oneself of sentimentality, pathos and similar afflictions, one is allowing justice, love and pity to do their cognitive work, their work of disclosing reality. It is the same love, [Simone] Weil tells us, that sees what is invisible.

Compare Alain Finkielkraut, In the Name of Humanity: Reflections on the Twentieth Century 5-6 (2000) (commenting on Primo Levi's encounter, at Auschwitz, with the German chemist Doktor Engineer Pannwitz): "To Doktor Pannwitz, the prisoner standing there [Levi], before the desk of his examiner, is not a frightened and miserable man. He is not a dangerous or inferior or loathsome man either, condemned to prison, torture, punishment, or death. He is, quite simply, not a man at all."

[51] See also Luke 6:27-35. Recall here the Parable of the Good Samaritan (Luke 10:29-37):

> But the man was anxious to justify himself and said to Jesus, "And who is my neighbour?" In answer Jesus said, "A man was once on his way down from Jerusalem to Jericho and fell into the hands of bandits; they stripped him, beat him and then made off, leaving him half dead. Now a priest happened to be travelling down the same road, but when he saw the man, he passed by on the other side. In the same way a Levite who came to the place saw him, and passed by on the other side. But a Samaritan traveller who came on him was moved with compassion when he saw him. He went up to him and bandaged his wounds, pouring oil and wine on them. He then lifted him onto his own mount and took him to an inn and looked after him. Next day, he took out two denarii and handed them to the innkeeper and said, 'Look after him, and on my way back I will make good any extra expense you have.' Which of these three, do you think, proved himself a neighbour to the man who fell into the bandits' hands?" [The man] replied, "The one who showed pity towards him." Jesus said to him, "Go, and do the same yourself."

As it happens, Sarah embodies Jesus' extravagant counsel to "love one another just as I have loved you." She loves all human beings. Sarah loves even "the Other": She loves 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.[52] Sarah loves even those from whom she is most estranged and toward whom she feels most antagonistic: those whose ideologies and projects and acts she judges to be not merely morally objectionable, but morally abominable.[53] Sarah loves even her enemies; indeed, Sarah loves even those who have violated her, who have failed to respect her inherent dignity. Sarah is fond of quoting Graham Greene to her incredulous friends: "When you visualized a man or a woman carefully, you could always begin to feel pity. . . . When you saw the corners of the eyes, the shape of the mouth, how the hair grew, it was impossible to hate. Hate was just a failure of imagination."[54]

Such love--such a state of being, such an orientation in the world--is, obviously, an ideal. Moreover, it is, for most human beings, an extremely demanding ideal; for many

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In *The New Jerusalem Bible*, a note attached to "Samaritan" explains that "[t]he contrast is between the element in Israel most strictly bound to the law of love, and the heretic and stranger, . . . from whom normally only hate could be expected."

[52] See Norman Geras, The Contract of Mutual Indifference: Political Philosophy after the Holocaust 67 (1998): "The claims of the intimate circle are real and important enough. Yet the movement from intimacy, and to faces we do not know, still carries the ring of a certain local confinement. For there are the people as well whose faces we never encounter, but whom we have ample means of knowing *about*. . . . [T]heir claims too, in trouble, unheeded, are a cause for shame."

[53] See Gaita, n. #, at xviii-xix: "[T]he language of love . . . compels us to affirm that even . . . the most radical evil-doers . . . are fully our fellow human beings."

[54] Graham Greene, The Power and the Glory 131 (Penguin ed. 1940). For a dissenting view on hate, see Meir Y. Soloveichik, "The Virtue of Hate," First Things, February 2003, at 41. As the Chronicle of Higher Education stated, in an e-mail notice on this article dated Feb. 13, 2003: "Rabbi Soloveichik asks: 'Is an utterly evil man . . . deserving of a theist's love?' and, reflecting on his conversations with Christian clergymen, concludes that there is 'no minimizing the difference between Judaism and Christianity on whether hate can be virtuous.' He examines the 'theological underpinnings' for each faith's approach to hote and notes that 'the crucifixion is a story of a loving God seeking humanity's salvation,' but that 'not a single Jewish source asserts that God deeply desires to save all humanity.'" For vigorous criticism, by religious Jews and others, of Soloveichik's essay, and a response by Soloveichik, see "Correspondence: Jews and Christians, Hate and Forgiveness," First Things, May 2003, at 2-9.

persons, it is also an implausible ideal.[55] Why should anyone embrace the ideal? Why should anyone want to be (or to become) such a person--a person who, like Sarah, loves even the Other? This is, existentially if not intellectually, the fundamental moral question for anyone: Why should I want to be the kind of person who makes the choices, who does the things, I am being told I should make/do. And, in fact, Sarah's interlocutor presses her with this question: "Why should I want to be the kind of person who, like you, loves the Other? What reason do I have to do *that*?" Because that is essentially the question about the ground of the normativity in the claim that we should live our lives in a way that respects the inherent dignity of every human being, Sarah is puzzled; she thought that she had already answered the question. Sarah patiently rehearses her answer, an answer that appeals ultimately to *one's commitment to one's own authentic well-being*: "The most deeply satisfying way of life of which we are capable is one in which we 'love one another just as I have loved you.' By becoming persons who love one another, we fulfill--we perfect--our created nature and thereby achieve our truest, deepest, most enduring happiness."[56] It is now Sarah's turn to ask a question of her interlocutor: "What further reason could you possibly want for becoming (or remaining) the kind of person who loves the Other?"

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[55] It seems to have been an implausible ideal for Ivan Karamazov:

> I have never been able to understand how it was possible to love one's neighbors. And I mean precisely one's neighbors, because I can conceive of the possibility of loving those who are far away. I read somewhere about a saint, John the Merciful, who, when a hungry frozen beggar came to him and asked him to warm him, lay down with him, put his arms around him, and breathed into the man's reaking mouth that was festering with the sores of some horrible disease. I am convinced that he did so in a state of frenzy, that it was a false gesture, that this act of love was dictated by some self-imposed penance. If I must love my fellow man, he had better hide himself, for no sooner do I see his face than there's an end to my love for him.

Fyodor Dostoevsky, The Brothers Karamazov, opening of ch. 5, IV (Constance Garnett, tr., 1933).

[56] Thus, Sarah rejects as false Vacek's distinction between "natural-law ethics" and "mutual-love ethics". See Edward Collins Vacek, SJ, "Divine-Command, Natural-Law, and Mutual-Love Ethics," 57 Theological Studies 633 (1996): "In natural-law ethics, something is right because it fulfills human nature, and the task is to discover and realize that nature. In mutual-love ethics, something is finally right because it is appropriate to our love relationship with God, and the fundamental moral task is to live in accord with this relationship." For Sarah, what fulfills human nature is to live in a relationship of love with God and with other human beings. Vacek's "mutual-love ethics" seems to me better understood not as an alternative to, but as a version of, "natural-law ethics". For an excellent explication of Aquinas's understanding of the relation between self-love and other-love (and also between self-love and love of God), see Gallagher, n. #; see also Porter, n. #, at 209-10.

> When he was deliberating about how to live, St. Augustine asked, "What does anything matter, if it does not have to do with happiness?" His question requires explanation, because he is not advising selfishness nor the reduction of other people to utilities, and even qualification, because other things can have some weight. All the same, the answer he expects is obviously right: only a happy life matters conclusively. If I had a clear view of it, I could have no motive to decline it, I could regret nothing by accepting it, I would have nothing about which to deliberate further.[57]

A clarification may be helpful here. 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 a *self-regarding* reason? Does she do so, say, because it makes her happy to do so? No. Although feeding the hungry does make Sarah happy, that isn't why she does it. Given the kind of person she is, the reason--the *other-regarding* reason--Sarah feeds the hungry is this: "The hungry are my sisters and brothers; I love them." Now, a different question: Why is Sarah committed to being the kind of person she is, and why does she believe that everyone should want to be such a person? *Pace* Augustine, Sarah's answer to that question *is* self-regarding: "As persons who love one another, we fulfill our created nature and thereby achieve our truest, deepest, most enduring happiness."[58] 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."[59]

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[57] Stephen Scott, "Motive and Justification," 85 J. Philosophy 479, 499 (1988). On the term "happiness", see Julia Annas, "Virtue and Eudaimonism," 15 Social Philosophy & Policy 37, 53 n. 35 (1998): "Despite the differences between *eudaimonia* and happiness which I have explored in this essay, and which are striking to philosophers reflecting on virtue and happiness, 'happiness' is clearly the correct translation for *eudaimonia* in ancient literature of all kinds, and it would be a mistake to conclude that we should translate *eudaimonia* by some other term." Compare Richard Taylor, "Ancient Wisdom and Modern Folly," 13 Midwest Studies in Philosophy 54, 57, 58 (1988): "The Greek *eudaimonia* is always translated 'happiness,' which is unfortunate, for the meaning we attach to the word *happiness* is thin indeed compared to what the ancients meant by *eudaimonia*. *Fulfillment* might be a better term, though this, too, fails to capture the richness of the original term. . . . The concept of happiness in modern philosophy, as well as in popular thinking, is superficial indeed in comparison."

[58] Sarah's eudaimonistic, love-animated morality will not sit well with those whose thinking is under the influence of Kant. For an insightful, clarifying discussion of how sharply Kant's understanding of happiness differs from Aristotle's, see James Bernard Murphy, "Practical Reason and Moral Psychology in Aristotle and Kant," 000 Social Philosophy & Policy 257, 273-76 (2001).

[59] Grant, Altruism and Christian Ethics, n. #, at xix. Sarah agrees with Grant. She understands Aquinas to have defended substantially the same position. See note # [Gallagher

It bears emphasis that Sarah does not believe that she should be the kind of person she is because God has issued a command to her to be that kind of person--a command that, because God is entitled to rule, to legislate, she is obligated to obey. For Sarah, God is not best understood in such terms. A theistic religious vision does not necessarily include, though some conventional theistic religious visions do include, a conception of God as supreme legislator, issuing directives for human conduct.[60] For Sarah, for whom God is love, not supreme legislator, some choices are good for us to make (or not to make)--and, therefore, we ought (or ought not) to make them--not because God commands (or forbids) them, but because God is who God is, because the universe--the universe created and sustained by God who is love in an act that is an expression of God/love--is what it is, and, in particular, because we human beings are who we are. For Sarah, "[t]he Law of God is not what God legislates but what God is, just as the Law of Gravity is not what gravity legislates but what gravity is."[61] Sarah believes that because God is who God is, because the universe is what it is, and because we are who we are, and not because of anything commanded by God as supreme legislator, the most fitting way of life for us human beings--the most deeply satisfying way of life of which we are capable--is one in which we children of God, we sisters and brothers, "love one another just as I have loved you."

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& Porter]. Cf. David O. Brink, "A Puzzle about the Rational Authority of Morality," 6 Philosophical Perspectives 1, 22 (1992): "Unless agent-neutral reasons are necessarily superior reasons, the best solution would be to argue that agent-relative reasons, properly understood, support other-regarding moral requirements as well. So friends of agent-neutrality would do well to cultivate the resources of strategic and metaphysical egoists, even if they reject the rational egoist assumption that all reasons for action are agent-relative." (For Brink's discussion of "metaphysical egoism", see id. at 18-22. See also David O. Brink, "Self-Love and Altruism," 14 Social Philosophy & Policy 122 (1997). Augustine, Aquinas, and Sarah are all what Brink calls "metaphysical egoists".)

[60] Indeed, for some religious believers, such a "God" is an idol. Cf. Charles Larmore, "Beyond Religion and Enlightenment," 30 San Diego L. Rev. 799, 799-802 (1993).

[61] John Dominic Crossan, "Case Against Manifesto," 5 Law Text Culture 129, 144 (2000). For a version of Divine Command Theory--albeit, an unconventional version--that has a strong affinity with Sarah's moral "theory", see Martin Kavka & Randi Rashkover, "A Jewish Modified Divine Command Theory," 32 J. Religious Ethics 387 (2004). In discussion, Recep Senturk said that he doesn't see any conflict between a loving God and a legislating God. The holy scriptures of Judaism, Christianity, and Islam (Senturk said) always portray God as both a loving God and a legislating God. I don't mean to suggest that there is a conflict. For Sarah, nonetheless, "the Law of God is not what God legislates but what God is, just as the Law of Gravity is not what gravity legislates but what gravity is." Cf. id. at 411: "[W]e think that there is no philosophical ground for understanding 'obedience to God' in the sense [of] 'obedience to propositional sentences uttered by God.'"

IV. Is There a Plausible Secular Response?

Sarah is deeply skeptical that any secular ground can bear the weight of--that any secular worldview can embed--the twofold claim that every human being has inherent dignity and is inviolable.[62] (Recall that "is inviolable" = "we should not violate any human being" = "we should live our lives life in a way that respects the inherent dignity of every human being".) Sarah wonders whether there is anything one who is not a religious believer can say that is functionally equivalent to "the unashamedly anthropomorphic . . . claim that we are sacred because God loves us, his children."[63] Australian philosopher Raimond Gaita, who is an atheist,[64] has observed (in the passage that serves as the epigraph for the preceding section of this Essay) that "[i]f 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 [the religious articulation that all human beings, as beloved children of God, are sacred]." Examples of the hoped-for secular equivalent: "We may say that all human beings are

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[62] See Glenn Tinder, "Can We Be Good without God: The Political Meaning of Christianity," Atlantic, December 1989, at 69, 80 (passages rearranged and emphasis added):

> Nietzsche's stature is owing to the courage and profundity that enabled him to make all this unmistakably clear. He delineated with overpowering eloquence the consequences of giving up Christianity, *and every like view of the universe and humanity*. His approval of those consequences and his hatred of Christianity give force to his argument. 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. We cannot give up the Christian God--*and the transcendence given other names in other faiths*--and go on as before. We must give up Christian morality too. If the God-man is nothing more than an illusion, the same thing is true of the idea that every individual possesses incalculable worth. The standard of *agape* collapses. It becomes explicable only on Nietzsche's terms: as a device by which the weak and failing exact from the strong and distinguished a deference they do not deserve. Thus the spiritual center of Western politics fades and vanishes.

For Tinder's book-length treatment of the relevant issues, see Glenn Tinder, The Political Meaning of Christianity: An Interpretation (1989).

[63] See n. # and accompanying text.

[64] See John Haldane, "The Greatest of These Is Love, as an Atheist Reminds Us," The Tablet [London], Dec. 9, 2000, at 1678.

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 Gaita's reluctant 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."

Now, to doubt, as Sarah does, that any secular ground can bear the weight of the twofold claim that every human being has inherent dignity and is inviolable is not to doubt that a nonbeliever can both affirm that every human being has inherent dignity and live her life accordingly. Nonetheless, as the Polish philosopher Leszek Kolakowski has written,

> When Pierre Bayle argued that morality does not depend on religion, he was speaking mainly of psychological independence; he pointed out that atheists are capable of achieving the highest moral standards . . . and of putting to shame most of the faithful Christians. That is obviously true as far as it goes, *but this matter-of-fact argument leaves the question of validity intact;* neither does it solve the question of the effective sources of the moral strength and moral convictions of those 'virtuous pagans.'"[65]

This Essay is partly about what Kolakowski calls "the question of validity".

In addressing that question, I am not suggesting that morality cannot survive the death of God. There is, after all, not just one morality in the world; there are many. Nor am I suggesting that one cannot be good unless one believes in God. Many people who do not believe in God are good, even saintly,[66] just as many people who believe in God--including many Christians, as Desmond Tutu has reminded us--are not good.[67] Nonetheless, it is

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[65] Leszek Kolakowski, Religion, If There Is No God: On God, the Devil, Sin, and Other Worries of the So-Called Philosophy of Religion 191 (1982) (emphasis added).

[66] Kristen Monroe's study of altruists and altruism is relevant here: Monroe, n. #, at 216.

[67] See Jim Wurst, "Archbishop Tutu Examines Link Between Religion and Politics," U.N. Wire, March 18, 2004 (reporting on and quoting Archbishop Tutu's speech "God's Word and World Politics"):

> Religion . . . is neither automatically good or bad, it can be either depending on what it inspires its adherents to do. Religion has the capacity to produce saints, but it also has the capacity to produce rogues. . . . Christians need to be among the most modest because of the many ghastly things that Christians have perpetrated [e.g., slavery, apartheid, Nazi Germany and the Holocaust, fascism in Italy and Spain, the dropping of the atomic bombs on Hiroshima and Nagasaki, the Ku Klux Klan and the Rwanda genocide]. We who are Christians have much that should make us hang our heads in shame.

obscure to Sarah what ground one who is not a religious believer can give for the twofold claim that every human being has inherent dignity and that we should live our lives accordingly. It is especially obscure to her what ground a resolute atheist can give.[68]

Imagine a cosmology according to which the universe is, finally and radically, meaningless[69]--or, even if meaningful in some sense, not meaningful in a way hospitable to

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[68] Cf. Rist, n. #, at 267 ("Although a 'moral saint' may exist without realist (and therefore religious) beliefs, yet his stance as a moral saint cannot be *justified* without recourse to realism."); Taylor, "Closed World Structures," n. #, at 61:

> The logic of the subtraction story is something like this: Once we slough off our concern with serving God, or attending to any other trascendent reality, what we're left with is human good, and that is what modern societies are concerned with. But this radically under-describes what I'm calling modern humanism. That I am left with only human concerns doesn't tell me to take universal human welfare as my goal; nor does it tell me that freedom is important, or fulfillment, or equality. Just being confined to human goods could just as well find expression in my concerning myself exclusively with my own material welfare, or that of my family or immediate milieu. The, in fact, very exigent demands of universal justice and benevolence which characterize modern humanism can't be explained just by the subtraction of earlier goals and allegiances.

As to the other question Kolakowski identifies--"the question of the effective sources of the moral strength and moral convictions of those 'virtuous pagans'"--Jürgen Habermas offers only a bleak response:

> Who or what gives us the courage for such a total engagement that in situations of degradation and deprivation is already being expressed when the destitute and deprived summon the energy each morning to carry on anew? The question about the meaning of life is not meaningless. Nevertheless, the circumstance that penultimate arguments inspire no great confidence is not enough for the grounding of a hope that can be kept alive only in a religious language. The thoughts and expectations directed toward the common good have, after metaphysics has collapsed, only an unstable status.

Habermas, n. #, at 81-82.

[69] Bruce Ackerman has announced: "There is no moral meaning hidden in the bowels of the universe." Bruce A. Ackerman, Social Justice in the Liberal State 368 (1980). See also Bertrand Russell, Mysticism and Logic 47-48 (1917):

> That man is the product of causes which had no prevision of the end they were achieving; that his origin, his growth, his hopes and fears, his loves and his beliefs, are but the outcome of accidental collocations of

our deepest yearnings for what Abraham Heschel called "ultimate relationship, ultimate belonging".[70] Consider, for example, Clarence Darrow's bleak vision (as recounted by Paul

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> atoms; that no fire, no heroism, no intensity of thought and feeling, can preserve an individual life beyond the grave; that all the labor of the ages, all the devotion, all the inspiration, all the noonday brightness of human genius, are destined to extinction in the vast death of the solar system, and that the whole temple of man's achievement must inevitably be buried beneath the debris of a universe in ruins--all these things, if not quite beyond dispute, are yet so certain that no philosophy which rejects them can hope to stand. Only within the scaffolding of these truths, only on the firm foundation of unyielding despair, can the soul's habitation henceforth be safely built.

Ackerman's declaration, like Russell's before him, brings to mind one of Nietzsche's sayings:

> Man a little, eccentric species of animal, which--fortunately--has its day; all on earth a mere moment, an incident, an exception without consequences, something of no importance to the general character of the earth; the earth itself, like every star, a hiatus between two nothingnesses, an event without plan, reason, will, self-consciousness, the worst kind of necessity, *stupid* necessity-- Something in us rebels against this view; the serpent vanity says to us: "all that *must* be false, *for* it arouses indignation-- Could all that not be merely appearance? And man, in spite of all, as Kant says--"

Friedrich Nietzsche, The Will to Power 169 (Walter Kaufmann & R.J. Hollingdale, trs., & Walter Kaufmann, ed., 1967).

[70] For the person deep in the grip of, the person claimed by, the problem of meaning, "[t]he cry for meaning is a cry for ultimate relationship, for ultimate belonging", wrote Heschel. "It is a cry in which all pretensions are abandoned. 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? Is there a way of living in the Presence? Is there a way of living compatible with the Presence?" Heschel, Who Is Man?, n. #, at 75. See also Fyodor Dostoevsky, The Brothers Karamazov 235 (Norton ed. 1976): "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." (This is one of the Grand Inquisitor's statements in chapter 5 of Book Five.) Cf. W.D. Joske, "Philosophy and the Meaning of Life," in E.D. Klemke, ed., The Meaning of Life 248, 250 (1981) ("If, as Kurt Vonnegut speculates in *The Sirens of Titan*, the ultimate end of human activity is the delivery of a small piece of steel to a wrecked space ship wanting to continue a journey of no importance whatsoever, the end would be too trivial to justify the means."); Robert Nozick, Philosophical Explanations 586 (1981) ("If the cosmic role of human beings was to provide a negative lesson to some others ('don't act like them') or to provide needed food to passing intergalactic travelers who *were* important, this would not

Edwards):

> Darrow, one of the most compassionate men who ever lived, . . . concluded that life was an "awful joke." . . . Darrow offered as one of his reasons the apparent aimlessness of all that happens. "This weary old world goes on, begetting, with birth and with living and with death," he remarked in his moving plea for the boy-murderers Loeb and Leopold, "and all of it is blind from the beginning to the end." Elsewhere he wrote: "Life is like a ship on the sea, tossed by every wave and by every wind; a ship headed for no port and no harbor, with no rudder, no compass, no pilot; simply floating for a time, then lost in the waves." In addition to the aimlessness of life and the universe, there is the fact of death. "I love my friends," wrote Darrow, "but they all must come to a tragic end." Death is more terrible the more one is attached to things in the world. Life, he concludes, is "not worthwhile," and he adds . . . that "it is an unpleasant interruption of nothing, and the best thing you can say of it is that it does not last long."[71]

One prominent contemporary proponent of a Darrowian cosmology, the physicist and Nobel laureate, Steven Weinberg, "finds his own world-view 'chilling and impersonal'. He cannot understand people who treat the absence of God and of God's heaven as unimportant."[72]

Where is there a place in a cosmological view like Darrow's and Weinberg's, Sarah wonders, for the morality of human rights to gain a foothold? For one who believes that the universe is utterly bereft of transcendent meaning, why--in virtue of what--is it the case that every human being has inherent dignity and is inviolable? Richard Posner apparently shares Sarah's lack of comprehension: "Thomas Nagel is a self-proclaimed atheist, yet he thinks that no one could *really* believe that 'we each have value only to ourselves and to those who care about us.' Well, to whom then? Who confers value on us without caring for us in the way

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suit our aspirations--not even if afterwards the intergalactic travelers smacked their lips and said that we tasted good.").

[71] Paul Edwards, "Life, Meaning and Value of," 4 Encyclopedia of Philosophy 467, 470 (Paul Edwards, ed., 1967). Whether Clarence Darrow was in fact "one of the most compassionate men who ever lived" is open to question. For a revisionist view of Darrow, see Gary Wills, Under God: Religion and American Politics, chs. 8-9 (1990).

[72] John Leslie, "Is It All Quite Simple? The Physicist's Search for a Theory of Everything," Times Lit. Supp., Jan. 29, 1993, at 3 (reviewing, inter alia, Steven Weinberg, Dreams of a Final Theory (1992)). Cf. Paul Davies, "The Holy Grail of Physics," New York Times Book Rev., Mar. 7, 1993, at 11 (reviewing, inter alia, Weinberg's book): "Reductionism [in physics] may be a fruitful research method, but it is a bleak philosophy. . . . If the world is but a collection of inert atoms interacting through blind and purposeless forces, what happens to . . . the meaning of life?"

that we care for friends, family, and sometimes members of larger human communities? Who else but the God in whom Nagel does not believe?"[73] Sarah is inclined to concur in R.H. Tawney's view (except that where Tawney says "all" morality, Sarah would say something like "our" morality): "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. But to believe this it is necessary to believe in God."[74] One need not be a religious believer to concur in Tawney's view. Jeffrie Murphy, for example, insists that it is, for him, "very difficult--perhaps impossible--to embrace religious convictions", but he nonetheless claims that "the liberal theory of rights requires a doctrine of human dignity, preciousness and sacredness that cannot be utterly detached from a belief in God or at least from a world view that would be properly called religious in some metaphysically profound sense." Murphy continues: "[T]he idea that fundamental moral values may require [religious] convictions is not one to be welcomed with joy [by secular enthusiasts of the liberal theory of rights]. This idea generates tensions and appears to force choices that some of us would prefer not to make. *But it still might be true for all of that.*"[75] Raimond Gaita says much the same thing:

> The secular philosophical tradition speaks of inalienable rights, inalienable dignity and of persons as ends in themselves. These are, I believe, ways of whistling in the dark, ways of trying to make secure to reason what reason cannot finally underwrite. Religious traditions speak

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[73] Richard A. Posner, "The Problematics of Moral and Political Theory," 111 Harvard L. Rev. 1637, 1687 (1998) (citing Thomas Nagel, The Last Word 130 (1997)). Cf. James Boyd White, "Talking about Religion in the Language of Law: Impossible but Necessary," 81 Marquette L. Rev. 177, 197-99 (1998) (explaining why he has difficulty understanding what one who is not a religious believer might be saying in affirming the Declaration of Independence's insistence on the "equality" of all human beings).

[74] J.M. Winter & D.M. Joslin, eds., R.H. Tawney's Commonplace Book 67 (1972). On Aug. 13, 1913, Tawney wrote, in his diary, the passage accompanying this note. Three days earlier, on Aug. 10, he quoted in his diary T.W. Price, Midland secretary of the Workers' Educational Association and lecturer at Birmingham University: "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 man's relations to his neighbors become meaningless unless there is some higher power above them both." Id. Cf. Dennis Prager, "Can We Be Good Without God?," 9 Ultimate Issues 3, 4 (1993): "If there is no God, you and I are purely the culmination of chance, pure random chance. And whether I kick your face in, or support you charitably, the universe is as indifferent to that as whether a star in another galaxy blows up tonight."

[75] Jeffrie Murphy, "Afterword: Constitutionalism, Moral Skepticism, and Religious Belief," in Alan S. Rosenbaum, ed., Constitutionalism: The Philosophical Dimension 239, 248 (1988) (emphasis added).

> of the sacredness of each human being, but I doubt that sanctity is a concept that has a secure home outside those traditions.[76]

Nietzsche asked: "Now suppose that belief in God has vanished: the question presents itself anew: 'who speaks?'"[77] Echoing Nietzsche's question a horrific century later, Art Leff wrote:

> Napalming babies is bad.
> Starving the poor is wicked.
> Buying and selling each other is depraved.
> Those who stood up to and died resisting Hitler, Stalin, Amin,
> and Pol Pot--and General Custer too--have earned salvation.
> Those who acquiesced deserve to be damned.
> There is in the world such a thing as evil.
> [All together now:] Sez who?
> God help us.[78]

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[76] Gaita, n. #, at 5. I have trouble squaring what Gaita says in the passage accompanying this note, and in other passages I have quoted in this Essay, with what he says in this passage:

> Although I fully acknowledge that it is our religious tradition that has spoken most simply (and perhaps most deeply) about this when it declared that all human beings are sacred, I think that the conception of individuality I have been articulating, even as transformed by a language of love nourished by the love of saints, can stand independently of explicit religious commitment and independently of speculation about supernatural entities. What grew and was nourished in one place, I say, might take root and flourish elsewhere.

Id. at xx.

[77] Nietzsche, The Will to Power, n. #, at 157.

[78] Arthur Allen Leff, "Unspeakable Ethics, Unnatural Law," 1979 Duke L. J. 1229, 1249. See also John T. Noonan, Jr., "Posner's Problematics," 111 Harvard L. Rev. 1768 (1998): "These three propositions [if no lawgiver, no law; if no law, no judge; if no judge, no judgment], which have the strength of self-evidence, sum up the predicament of most of the academic moralists who are Judge Posner's targets. These moralists acknowledge no lawgiver and no judge. Their vulnerability is patent. The attempts to pronounce moral judgments are doomed to failure."

V. John Finnis's Secular Responses

As I've just reported, Sarah is deeply skeptical that any secular ground can bear the weight of the twofold claim that every human being has inherent dignity and is inviolable. But perhaps Sarah's skepticism is misplaced. Let's consider John Finnis's affirmative secular responses to question whether the morality of human rights is true (or at least partly true)--whether, that is, we (or at least some of us) have conclusive reason to live the kind of life the morality of human rights claims that we--every one of us--should live: *a life in which we strive never to violate any human being, never to treat any human being as if she lacks inherent dignity; a life in which we strive always to respect the inherent dignity of every human being?*

Alan Wolfe has remarked that "[a]mong Catholic intellectuals, as well as some who are not Catholic, the most important Catholic inheritance is the natural-law [moral] tradition . . ."[79] The distinguished legal and moral philosopher John Finnis, who is Roman Catholic, works in that tradition.[80] Finnis "believes that a major contribution of his account of ethics is its demonstration of clear and reliable moral truths about moral actions . . . that appeal to all rational persons" without regard to whether they are religious believers.[81] If Finnis's "account of ethics" succeeds in demonstrating "clear and reliable moral truths about moral actions that appeal to all rational persons", including those who are not religious believers, perhaps Finnis's account can provide a secular response to the question why all of us should live a life in which we strive never to violate any human being, never to treat any human being as if she lacks inherent dignity. Does Finnis's account succeed?

Twenty-seven years ago, in *Natural Law and Natural Rights* (NLNR), Finnis argued that no one should intentionally harm (any aspect of) the well-being of another, because to do so would be to act contrary to the requirement "of fundamental impartiality among the human

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[79] Alan Wolfe, "The Intellectual Advantages of a Roman Catholic Education," Chronicle of Higher Education, May 31, 2002.

[80] We need to distinguish between "natural law" as a moral tradition and "natural law" as a jurisprudential tradition. John Finnis works in both traditions. See, e.g., John Finnis, Natural Law and Natural Rights (1980); John Finnis, Aquinas: Moral, Political, and Legal Theory (1998). However, I am interested here only in Finnis's work in the natural-law moral tradition. For important contemporary work on and in the natural-law jurisprudential tradition, see Mark C. Murphy, Natural Law in Jurisprudence and Politics (2006).

[81] Thomas W. Smith, "Finnis' Questions and Answers: An Ethics of Hope or Fear?," 40 American J. Jurisprudence 27, 29 (1995). According to Catholic (and Scottish) philosopher John Haldane, "the late Elizabeth Anscombe . . . was keen to emphasise that the content of the natural law is simply the content of ethics, so far as it is independent of revelation." John Haldane, "Ethics and Natural Law," The Tablet [London], Jan. 27, 2007, at 18.

subjects who are or may be partakers of [the basic human goods]."[82] Assuming that to intentionally harm the well-being of another is to act contrary to Finnis's requirement of fundamental impartiality, why should one avoid acting contrary to the requirement? Until Finnis answers that question, he has not provided a ground for the normativity--for the "should"--in the claim that no one should intentionally harm the well-being of any human being.

The totality of Finnis's brief answer, in NLNR, to that, the ground-of-normativity question, is that it is *unreasonable* for a human being, who presumably values his own well-being, to intentionally harm the well-being of another human being: "[My own well-being] is [not] of more value than the well-being of others, simply because it is mine: intelligence and reasonableness can find no basis in the fact that A is A and not B (that I am I and not you) for evaluating (our) well-being differentially."[83]

Let's assume that one is committed to "intelligence and reasonableness". Finnis's answer in NLNR doesn't work. One may reply to Finnis:

> My own well-being is not of more value *to whom* than the well-being of others?[84] My own well-being--or the well-being of someone I love, like my child--may well be of more value *to me* than your well-being; or, your well-being may be of no value to me; in some situations, your well-being--your continued existence--may be a disvalue to me. (Your well-being is probably of more value *to you* than my well-being; or, my well-being may be of no value to you; or, my continued existence may be a disvalue to you.) If your well-being is of no value to me, it is not necessarily "unreasonable" for me to intentionally harm your well-being in an effort to achieve something of great importance to me or to someone I love. As Richard Joyce (among others) has noted, "even if we allow that in valuing his own humanity, Al, on pain of irrationality, must accept that others value their own humanity as he does, this falls dramatically short of his being rationally required to value their humanity."[85]

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[82] Finnis, Natural Law and Natural Rights, n. #, at 107.

[83] Id. at 107.

[84] To say that X is of value (or that X has value) is to say that X is of value *to* (or that X has value *for*) someone(s) (e.g., John Finnis) or something(s) (e.g., a cat or a plant). That X is of value, whether instrumental or intrinsic, to A does not entail that X is also of value to B. Similarly, that Y is a reason for A--a *practical* reason, a reason for choosing to do *this* rather than *that*--does not entail that Y is a also reason for B.

[85] Joyce, The Myth of Morality, n. #, at 126. In 1985, Jeffrey Goldsworthy made substantially the same criticism of Finnis's argument in an essay in the *American Journal of Jurisprudence*: J.D. Goldsworthy, "God or Mackie? The Dilemma of Secular Moral Philosophy," 1985 American J. Jurisprudence 43, 73-77. Goldsworthy concluded: "[John] Finnis has tried to do in two pages what . . . others have devoted entire books to: . . . show that egoism is inherently self-contradictory or irrational. All of these attempts have failed. It is surprising that Finnis deals with such a problematic and contentious issue in such a brief and casual fashion." Id. at 75. See also Mark R. Discher, "Does Finnis Get Natural Rights for

Given that the brief answer he gave to the ground-of-normativity question in NLNR doesn't work, it's not surprising that Finnis has returned to the question in a recent essay, "On 'Public Reason'" (2006).[86] The different answer Finnis now gives is substantially the answer Sarah gives--but without Sarah's, or any other, theology. Finnis claims, in the essay, that "friendship"--in the sense of "goodwill towards other persons"--is a basic good for every human being.[87] It is clear, in the context of the essay, that Finnis means goodwill toward not just some but all other persons. To act contrary to what is a basic good for onself is "self-mutilating".[88] To attack the well-being of another person is to act contrary to what is a basic good for oneself: friendship; it is to act, not with goodwill toward him or her whose well-being one attacks, but with ill will. Therefore, concludes Finnis, to attack the well-being of another person is self-mutilating. As Finnis puts it:

> Because one's pursuit of fulfillment would be unreasonable and self-mutilating if it were indifferent to friendship and to the worth of the instantiation of human goods in the lives of other people, one needs look to putting in order one's relations with one's fellows, one's communities. The name for that order, *and* to one's constant concern for it, is justice.[89]

This, then, is Finnis's most recent answer to the question about the ground of the "should" in the claim that no one should intentionally harm the well-being of any human being: To attack the well-being of another is to mutilate oneself--it is to attack one's own well-being--and so (assuming one is committed to one's own well-being) one has conclusive reason not to attack the well-being of another. Moreover, argues Finnis, this truth "is not something we just invent; rather, it *becomes clear to us* by experience, thought-experiment, discussion, rational judgment."[90]

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Everyone?" 80 New Blackfriars 19 (1999). Cf. Jeffrey Goldsworthy, "Fact and Value in the New Natural Law Theory," 1996 American J. Jurisprudence 21.

[86] http://ssrn.com/abstract=955815.

[87] Id. at 11.

[88] Id. at 16.

[89] Id. at 16-17.

[90] Id. 17. See id. at 17-18:

> One cannot . . . have order in one's soul (will) without anticipating and doing what one reasonable can to promote and respect an order of equal justice in one's societies, one's associating or communion with one's fellows. And it would be folly to expect justice and friendship to exist in any society whose members are not concerned to promote and maintain such rational, desire-integrating order in their

I said that the answer Finnis now gives to the ground-of-normativity question is substantially the answer Sarah gives--but without Sarah's, or any other, theology. Unlike Sarah, Finnis means his response to stand independently of any theological premises. Recall Sarah's religious response to the ground-of-normativity question: Because God is who God is, because the universe is what it is, and because we are who we are, the most fitting way of life for us human beings--the most deeply satisfying way of life of which we are capable--is one in which we children of God, we sisters and brothers, are persons who "love one another just as I have loved you." In his response, by contrast, Finnis responds without reference to God or God's created order. We can imagine Finnis--or, indeed, an agnostic, or even an atheist--saying to Sarah:

> Like you, I believe that by be(com)ing persons who love one another, to that extent we fulfill our nature and thereby achieve our truest, deepest, most enduring happiness. But unlike you, I don't want to rely on any claim about our "created" nature: a nature created by God. Instead, I want to rely only on a claim about our nature, whether or not there is a God and, if there is a God, whether or not our nature is created by God. Given the nature we humans have, the most fitting way of life for us human beings, the most deeply satisfying way of life of which we are capable, is one in which we love one another--"one another" in your radically inclusivist sense, which includes even the Other. (Look at all those fulfilled other-lovers: They have a serenity and centeredness that cannot fail to impress.) That fact, coupled with our commitment to our own authentic well-being, is the ground of normativity.[91]

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> individual souls (wills). Moreover, just as no-one could intelligently call a society good whose members treat each other as robbers treat their victims, so no-one could intelligently call good the life of an individual who is enslaved to his subrational desires for gratification and thus, too, cut off from the reality, as opposed to spurious imitations, of friendship. In each type of case--the individual and the society--the order in question is good because it is intelligent and reasonable, and the corresponding forms of disorder are so far forth unreasonable and bad. And this appropriateness of good order in the individual and society is not something we just invent; rather, it *becomes clear to us* by experience, thought-experiment, discussion, rational judgment.
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> So, both because its desirability is discovered rather than dreamed up and because being reasonable is central to what we find ourselves to be (*in potentia*) and reasonably want to become and remain (in act), we can call this reasonable order in the soul and in society *"natural"*--something *naturally* good. And since in each type of case the good, reasonable, natural order can and must be picked out in the form of normative propositions directing one towards individual and social choices promotive of respectful of good order, the relevant directive propositions are called *laws*.

[91] I am grateful to Chris Eberle and Steve Smith for suggesting this position to me.

The fundamental problem with the position just articulated, as compared to Sarah's, is this: In the absence of a larger metaphysical context with which it coheres--indeed, in which it makes sense as an integral part of the whole--the alleged invariable connection between "being persons who love one another (in the radical sense of 'one another')" and "fulfilling (perfecting, completing) our nature" seems contrived; it seems too good to be true. Sarah's religious position is embedded in--and it has whatever plausibility or implausibility it has because of its embeddedness in--a particular religious worldview: a particular web of religious beliefs, especially the beliefs that (a) every human being is a beloved child of God and a sister/brother to every other human being and (b) human beings are created by God to love one another. By contrast, it is a presupposition of the secular position--Finnis's position--that *it holds even if the universe is just what Clarence Darrow and Steven Weinberg (among others) have proclaimed it to be: a cosmic process bereft of ultimate meaning.* As Darrow put it: "This weary old world goes on, begetting, with birth and with living and with death, and all of it is blind from the beginning to the end."[92] According to the Darrowian-Weinbergian worldview, human beings, far from being created "in the image of God",[93] are merely the unplanned, unintended yield of random mutation and natural selection. But, lo and behold, it just happens that the nature of human beings--the nature evolution has bequeathed them--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. That free-floating secular position seems so ad hoc. In e-mail discussion, Steve Smith has observed that

> [w]ithout some suitable meta-story, it just seems incredible that everyone would find happiness/fulfillment in becoming the kind of person who cares about [all] others. . . . [I]f "evolution" is the substitute story, then it seems more plausible to imagine that we would be constructed for struggle, and would find fulfillment in squashing our competitors. I realize that a degree of altruism can be accounted for in terms of promoting the survival of a group with similar genes, but any broader inclination to serve others seems incompatible with the evolution story. And if no story at all is offered, so that the line is "I don't know how, but that's just the way we're made--basically we're all cut out to be nice guys," the contrary evidence seems overwhelming."[94]

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[92] See n. # and accompanying text.

[93] See n. #.

[94] E-mail from Steven Smith to Michael Perry, Sept. 16, 2002. See also Michael Ruse, "Evolutionary Ethics: A Defence," in Holmes Rolston III, ed., Biology, Ethics, and the Origins of Life 93, 104-05 (1995). Cf. H. Allen Orr, "Darwinian Storytelling," New York Rev., Feb. 27, 2003, at 17, 20 (reviewing Steven Pinker, The Blank Slate: The Modern Denial of Human Nature (2002)):

> [T]he moral circle expands, [Pinker] says, by the principle of reciprocal altruism, a sociobiological theory that shows how kindness can spread

Now, few would deny that the social nature of human beings is such that a person is better off in virtue of being part of a network of loving family and friends, and also in virtue of being a member of safe, secure political community. But that's a far cry from claiming that the nature of human beings is such that being a person who "loves one another just as I have loved you (in the radical sense of 'one another')" is the most deeply satisfying way of life of which human beings are capable.[95]

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> even among unrelated individuals. To Pinker, then, the moral circle is primarily "pushed outward by the expanding networks of reciprocity that make other human beings more valuable alive than dead." This network is facilitated by "trade, cultural exchanges, and people-to-people activities."
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> But this is silly. The notion that our moral circle expanded by reciprocity is in many instances ahistorical nonsense. Men had plenty of "people-to-people" interaction with women while condemning them to second-class citizenship. And slaveholding Southerners had more "cultural exchanges" and "people-to-people activities" with African-Americans than did abolitionist Northerners. At what point in history did our "networks of reciprocity" with women and slaves become sufficiently dense that the calculus of reciprocity demanded that we grant them the vote and freedom? The question is absurd. The fact is that for every case in which morality plausibly expanded by reciprocity there is another in which it expanded by selfless moral reasoning, political or religious struggle, or even court rulings that forced a rule of conduct on those who initially opposed it. And it should be evident that a morality that bids us care for the severely handicapped cannot be explained by an expectation of reciprocity.

[95] Recall here Richard Rorty's contrast between "the rather rare figure of the psychopath, the person who has no concern for any human being other than himself" and "the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this range, the ones he or she thinks of as pseudohumans." Richard Rorty, "Human Rights, Rationality, and Sentimentality," in Stephen Shute & Susan Hurley, eds., On Human Rights: The Oxford Amnesty Lectures 1993 111, 123-24 (1993). According to Rorty, moral philosophy, to its detriment, has "systematically neglected" the latter in favor of the former." Id.

Rorty's "much more common case" is also much more common than the person at the other extreme from the psychopath: someone actively concerned about the well-being of every human being. We sometimes mark just how *uncommon* such an exemplary person is, in the real world, by calling her a "saint".

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Even if there is no plausible secular response to the ground-or-normativity question that engages us here, there are no doubt plausible secular reasons--indeed, plausible self-regarding secular reasons--for wanting the law, including international law, to establish and protect some human-rights-claims. In an address to the World Conference on Human Rights in June 1993, U.S. Secretary of State Warren Christopher argued that

> [a] world of democracies would be a safer world. . . . States that respect human rights and operate on democratic principles tend to be the world's most peaceful and stable. On the other hand, the worst violators of human rights tend to be the world's aggressors and proliferators. These states export threats to global security, whether in the shape of terrorism, massive refugee flows, or environmental pollution. Denying human rights not only lays waste to human lives; it creates instability that travels across borders.

Warren Christopher, "Democracy and Human Rights: Where America Stands," 4 U.S. Department of State Dispatch 441, 442 (1993). See also William F. Schultz, In Our Own Best Interests: How Defending HUman Rights Benefits Us All xix (2002) ("respect for human rights both in the United States and abroad has implications for our welfare far beyond the maintenence of our ethical integrity. Ignoring the fates of human rights victims almost anywhere 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."); William W. Burke-White, "Human Rights and National Security: The Strategic Connection," 17 Harvard Human Rights J. 249 (2004). Cf. Jerome J. Shestack, "An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy," 2 Harvard Human Rights Yearbook 25, 49-50 (1989) (listing several reasons that should "motivate an administration to afford human rights a central role in United States foreign policy as a matter of national interest").

However, self-regarding rationales for the law's establishing and protecting some human-rights-claims bear much less weight than we would like to think. See Richard B. Bilder, "Human Rights and U.S. Foreign Policy: Short-Term Prospects," 14 Virginia J. International L. 597, 608 (1974): "[Self-regarding] arguments are hard to prove and not fully persuasive. Despite considerable effort, it has been difficult to construct a wholly convincing 'selfish' rationale for major U.S. national commitments to promote the human rights of foreigners."

Sarah's religious response to the ground-of-normativity question reminds us that in the real world, if not in every academic moralist's study, fundamental moral questions are intimately related to religious (or metaphysical) questions; there is no way to address fundamental moral questions without also addressing, if only implicitly, religious questions.[96] (That is *not* to say that one must give a religious answer to a religious question, like the question, for example, Does God exist? Obviously many people do not give religious answers to religious questions.[97]) In the real world, one's response to fundamental moral questions has long been intimately bound up with one's response--one's answers--to certain other

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[96] See Peter Geach, God and the Soul 127-28 (1969).

[97] Jürgen Habermas' has acknowledged "that a philosophy that thinks postmetaphysically cannot answer the question that [David] Tracy . . . calls attention to: why be moral at all?" Habermas, n. #, at 81. What Habermas then goes on to say is really quite remarkable:

> At the same time, however, this philosophy can show why this question does not arise meaningfully for communicatively socialized individuals. We acquire our moral intuitions in our parents' home, not in school. And moral insights tell us that we do not have any good reasons for behaving otherwise: for this, no self-surpassing of morality is necessary. It is true that we often behave otherwise, but we do so with a bad conscience. The first half of the sentence attests to the weakness of the motivational power of good reasons; the second half attests that rational motivation by reasons is more than nothing [*auch nicht nichts ist*]--moral convictions do not allow themselves to be overridden without resistance.

Id. Let's put aside the fact that "we" acquire our moral "intuitions" in many places besides (or in addition to) our parents' home--in the streets, for example. The more important point, for present purposes, is that we don't all acquire the same moral intuitions. Some of us acquire moral intuitions that enable us to ignore, and perhaps even to brutalize, the Other without any pangs of "conscience". It is incredible that in the waning days of this unbearably brutal century, Habermas--writing in Germany of all places--could suggest otherwise. We need not even look at the oppressors themselves; we need look only at those whose passivity makes them complicitors. The real world is full of what Primo Levi called "us-ism": "Those on the Rosenstrasse who risked their lives for Jews did not express opposition to anti-semitic policies per se. They displayed primarily what the late Primo Levi, a survivor of Auschwitz, called 'selfishness extended to the person closest to you . . . us-ism.' In most of the stories that I have heard of Aryans who risked their lives for Jews to whom they were married, they withdrew to safety, one by one, the moment their loved ones were released. Their protests bring home to us the iron limits, the tragically narrow borders, of us-ism." Nathan Stoltzfus, "Dissent in Nazi Germany," Atlantic, September 1992, at 87, 94.

fundamental questions: Who are we? Where did we come from; what is our origin, our beginning? Where are we going; what is our destiny, our end?[98] What is the meaning of suffering? Of evil? Of death? And there is the cardinal question, the question that comprises many of the others: Is human life ultimately meaningful or, instead, ultimately bereft of meaning, meaning-less, absurd?[99] If any questions are fundamental, *these* questions--"religious or limit questions"[100]--are fundamental. Such questions--"naive" questions, "questions with no answers", "barriers that cannot be breached"[101]--are "the most serious and difficult . . . that any human being or society must face . . ."[102] John Paul II was surely right in his encyclical, *Fides et Ratio*, that such questions "have their common source in the quest

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[98] "In an old rabbinic text three other questions are suggested: '*Whence* did you come?' '*Whither* are you going?' 'Before *whom* are you destined to give account?'" Abraham J. Heschel, Who Is Man? 28 (1965). "All people by nature desire to know the mystery from which they come and to which they go." Denise Lardner Carmody & John Tully Carmody, Western Ways to the Center: An Introduction to Religions of the West 198-99 (1983). "The questions Tolstoy asked, and Gauguin in, say, his great Tahiti triptych, completed just before he died ('Where Do We Come From? What Are We? Where Are We Going?'), are the eternal questions children ask more intensely, unremittingly, and subtly than we sometimes imagine." Robert Coles, The Spiritual Life of Children 37 (1990).

[99] Communities, especially historically extended communities--"traditions"--are the principal matrices of religious answers to such questions: "Not the individual man nor a single generation by its own power, can erect the bridge that leads to God. Faith is the achievement of many generations, an effort accumulated over centuries. Many of its ideas are as the light of the star that left its source a long time ago. Many enigmatic songs, unfathomable today, are the resonance of voices of bygone times. There is a collective memory of God in the human spirit, and it is this memory which is the main source of our faith." From Abraham Heschel's two-part essay "Faith", first published in volume 10 of *The Reconstructionist*, Nov. 3 & 17, 1944. For a later statement on faith, incorporating some of the original essay, see Abraham J. Heschel, Man is Not Alone 159-76 (1951).

[100] David Tracy, Plurality and Ambiguity: Religion, Hermeneutics, Hope 86 (1987).

[101] In Milan Kundera's *The Unbearable Lightness of Being* the narrator, referring to "the questions that had been going through Tereza's head since she was a child", says that "the only truly serious questions are ones that even a child can formulate. Only the most naive of questions are truly serious. They are the questions with no answers. A question with no answer is a barrier than cannot be breached. In other words, it is questions with no answers that set the limits of human possibilities, describe the boundaries of human existence." Milan Kundera, The Unbearable Lightness of Being 139 (1984).

[102] David Tracy, The Analogical Imagination 4 (1981). Tracy adds: "To formulate such questions honestly and well, to respond to them with passion and rigor, is the work of all theology. . . . Religions ask and respond to such fundamental questions . . . Theologians, by definition, risk an intellectual life on the wager that religious traditions can be studied as authentic responses to just such questions." Id.

for meaning which has always compelled the human heart" and that "the answer given to these questions decides the direction which people seek to give to their lives."[103]

Of course, John Finnis understands all this: He is, after all, a devout Roman Catholic. Nonetheless, we may fairly wonder, after considering John Finnis's efforts, whether the natural-law moral tradition in which Finnis participates, *when shorn of any theological premises, in particular theological premises about our created nature,* is adequate to the challenge of answering the ground-of-normativity question that engages us here: Do we have conclusive reason to live a life in which we strive never to violate any human being. We may fairly wonder, that is, whether philosopher and classicist John Rist isn't right that "philosophers who, like [Germain] Grisez and Finnis, attempt to argue that God need not be invoked in [debates about moral obligation] are no more able to avoid him than was Kant, who, attempting to show that morality needs no metaphysical foundations (in his understanding

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[103] John Paul II, On the Relation Between Faith and Reason: Fides et Ratio, issued on Sept. 14, 1998. In the introduction to Fides et Ratio, John Paul II wrote:

> Moreover, a cursory glance at ancient history shows clearly how in different parts of the world, with their different cultures, there arise at the same time the fundamental questions which pervade human life: Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life? These are the questions which we find in the sacred writings of Israel and also in the Veda and the Avesta; we find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha; they appear in the poetry of Homer and in the tragedies of Euripides and Sophocles as they do in the philosophical writings of Plato and Aristotle. They are questions which have their common source in the quest for meaning which has always compelled the human heart. In fact, the answer given to these questions decides the direction which people seek to give to their lives.

Id. at Introduction, pt. 1. See also id., chapter 3, pt. 26. (*Fides et Ratio* would more accurately be named *Fides et Philosophia.*) We find a similar statement in the Second Vatican Council's Declaration on the Relation of the Church to Non-Christian Religions (*Nostra Aetate*, 1):

> People look to their different religions for an answer to the unsolved riddles of human existence. The problems that weigh heavily on people's hearts are the same today as in ages past. What is humanity? What is the meaning and purpose of life? Where does suffering originate, and what end does it serve? How can genuine happiness be found? What happens at death? What is judgement? What reward follows death? And finally, what is the ultimate mystery, beyond human explanation, which embraces our entire existence, from which we take our origin and toward which we tend?

of metaphysical), had to allow that without the ultimate sanction of God, his moral universe would collapse . . ."[104]

I can imagine Finnis responding, to Rist and others, along these lines:[105] "To make the moral arguments I want to make, I don't need to appeal to theological premises. I agree with Sarah about *why* human nature is as it is. In making the moral arguments I want to make, however, I don't need to stake out a position on why human nature is as it is." Well, I wonder. The view of human nature Finnis, qua Christian, shares with Sarah is one according to which the most fitting way of life for us human beings, the most deeply satisfying way of life of which we are capable, is one in which, inter alia, we love one another--in which we love even the Other--"just as I have loved you." I wonder whether that view of human nature is plausible--I wonder how plausible it can be--for one who does not take seriously a theological worldview like that sketched by Sarah. That's the worry I'm left with after considering Finnis's most recent response to the ground-of-normativity question.

VI. A Brief Comment on Kantian Morality

The principal alternative to the natural-law moral tradition in which Finnis participates is the Kantian moral tradition. (Richard Posner has noted that "Kant's footprints are all over modern moral theory."[106]) Does Kantian moral philosophy, unlike Finnis's natural-law moral philosophy, have the resources to provide a plausible secular (non-theological) response to the ground-of-normativity question?

Properly understood, normative reasons--reasons for a human agent to make this choice rather than that, or, more generally, to live this kind of life rather than that, to be this kind of person rather than that--are agent-relative ("internal") as distinct from agent-neutral ("external").[107] Put another way, there are no categorical imperatives, only hypothetical

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[104] Rist, n. #, at 259-60. Cf. id. at 2: "[Plato] came to believe that if morality, as more than 'enlightened' self-interest, is to be rationally justifiable, it must be established on metaphysical foundations . . ."

[105] Steve Smith, in discussion, has helped me to imagine Finnis responding along these lines.

[106] Posner, n. #, at 1664 n. 48.

[107] For a compelling argument in support of the claim that *normative* reasons must be internal (agent-relative), see Joyce, The Myth of Morality, n. #, at 106-34. See also Geach, n. #, at xix, 121-22. Cf. Henry B. Veatch, "Modern Ethics, Teleology, and Love of Self," 75 Monist 52, 60 (1992):

> [T]he stock answer given to this question ["Why should I be moral?"] has long been one of trying to distinguish between a *reason* and a *motive*

imperatives: "This is what you should do *if* you value, *if* you care about, X."[108] So, any argument in support of the "should" in a claim that one should live one's life in a certain way must appeal ultimately to some value to which the agent(s) to whom the argument is directed is (are) committed.[109] We may safely assume that virtually any agent to whom such an argument is directed is committed to this value: her own well-being; whatever else she is committed to, she is committed to her own flourishing, to her own happiness in the sense of eudaimonia.[110] Recall that Sarah's ground for normativity appeals to an agent's commitment to her own well-being. That an agent disbelieves what Sarah says about the requirements of the agent's authentic well-being is beside the point--as is the possibility that what Sarah says is false. *If* the agent is committed (as virtually any agent is) to her own well-being, and *if* she believes what Sarah says about the requirements of her well-being, then she has conclusive reason to live the kind of life the morality of human rights claims she should live, to be the kind of person the morality of human rights claims she should be.

The fatal problem with Kantian moral philosophy is its rejection of the human agent's commitment to her own well-being as the fundamental ground of moral normativity. I don't usually find myself in agreement with Roger Scruton, but in this instance I do:

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> for being moral. For surely, it is argued, if I recognize something to be my duty, then surely I have a reason to perform the required action, even though I have no motive for performing it. In fact, even to ask for a motive for doing something, when one already has a reason for doing it, would seem to be at once gratuitous and unnecessary--at least so it is argued. Unhappily, though, the argument has a dubious air about it at best. For does it amount to anything more than trying to prove a point by first attempting to make a distinction, implying that the distinction is no mere distinction, but a distinction with a difference--viz. the distinction between a reason and a motive. But then, having exploited the distinction, and yet at the same time insinuating that one might conceivably have a reason for doing something, but no motive for doing it, the argument draws to its conclusion by surreptitiously taking advantage of the fact that there possibly is no real distinction between a reason and a motive after all, so that if one has a reason for doing a thing, then one has a motive for doing it as well. In other words, it's as if the argument only succeeds by taking back with its left hand what it had originally given with its right.

[108] For a discussion of this point, with citations to several relevant pieces, see Perry, Morality, Politics, and Law, n. #, at 9-23.

[109] See Sharon Street, "Constructivism about Reasons" (draft, 8/15/06).

[110] On well-being, see n. # and accompanying text [Scott, Annas, and Taylor on "happiness"].

> The weakness of the Kantian position lies in its attribution of a "motivating force" to reason--in its denial of Hume's principle that reason alone cannot be a motive to action. The Aristotelian position involves no commitment to the idea of a "pure practical reason". It recognises that practical reasoning concludes in action only because it begins in desire. The "practical syllogism" has a practical premise, and to the agent with evil desires no reason can be given that will, by its sheer force as a reason, suffice to make him good. . . .
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> Aristotle's invocation of happiness, as the final end of human conduct, is essentially correct. 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. . . . But what is happiness? Kant dismissed the idea as empty: happiness, he argued, simply stands for the generality of human desires: it means different things for different people, and provides no coherent motive of its own. Following Aristotle, however, I shall propose an idea of happiness as a kind of "flourishing".[111]

Simon Blackburn makes essentially the same point. Referring to "the [Kantian] view that reasons that are seen only in the pull of the will and of love are not real reasons at all", Blackburn writes that "when we reflect what a cold picture of human nature that [view] implies, I think we *should* find it rather sad. . . . We can still do moral philosophy if we recognize that many of our concerns have passion and desire as their ancestors . . ."[112] Scruton and Blackburn are not alone. I could also quote, for example, philosophers as diverse in their orientations and sensibilities as Charles Taylor[113] and Richard Rorty.[114]

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[111] Roger Scruton, Sexual Desire: A Moral Philosophy of the Erotic 325, 326 (1986).

[112] Simon Blackburn, "Am I Right?" New York Times Book Rev., Feb. 28, 1999, at 24 (reviewing T. M. Scanlon, What We Owe to Each Other (1999)) (passages rearranged).

[113] As Charles Taylor has explained, contemporary Kantian moral philosophy

> has given such a narrow focus to morality . . . This moral philosophy has tended to focus on what it is right to do rather than on what it is good to be, on defining the content of obligation rather than the nature of the good life . . . This philosophy has accredited a cramped and truncated view of morality in a narrow sense, as well as of the whole range of issues involved in the attempt to live the best possible life, and this not only among professional philosophers, but with a wider public.

Charles Taylor, Sources of the Self: The Making of the Modern Identity 3 (1989). Taylor continues:

> [Such moral theories] leave us with nothing to say to someone who asks why he should be moral. . . . But this could be misleading, if we

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> seemed to be asking how we could convince someone who saw none of the point of our moral beliefs. There is nothing we can do to 'prove' we are right to such a person. But imagine him to be asking another question: he could be asking us to make plain the point of our moral code, in articulating what's uniquely valuable in cleaving to these injunctions. Then the implication of these theories is that we have nothing to say which can impart insight. We can wax rhetorical and propagandize, but we can't say what's good or valuable about [the injunctions], or why they command assent.

Id. See also id. at 4, 14-15, 63-64, 79, 87; Charles Taylor, "A Most Peculiar Institution," in J. E. J. Altham & Ross Harrison, eds., World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams 132 (1995); Charles Taylor, "Iris Murdoch and Moral Philosophy," in Maria Antonaccio & William Schweiker, eds., Iris Murdoch and the Search for Human Goodness 3 (1996).

[114] See Rorty, "Justice as a Larger Loyalty," n. #, at 11:

> Would it be a good idea to treat "justice" as the name for loyalty to a certain very large group, the name for our current largest loyalty, rather than the name for something distinct from loyalty? Could we replace the notion of "justice" with that of loyalty to that group--for example, one's fellow-citizens, or the human species, or all living things? Would anything be lost by this replacement?
>
> Moral philosophers who remain loyal to Kant are likely to think that a *lot* would be lost. Kantians typically insist that justice springs from reason, and loyalty from sentiment. Only reason, they say, can impose universal and unconditional moral obligations, and our obligation to be just is of this sort. It is on another level from the sort of affectional relations that create loyalty. Jürgen Habermas is our most prominent contemporary philosopher to insist on this Kantian way of looking at things: the thinker least willing to blur either the line between reason and sentiment, or the line between universal validity and historical consensus. But contemporary philosophers who depart from Kant, either in the direction of Hume (like Annette Baier) or in the direction of Hegel (like Charles Taylor) or in that of Aristotle (like Alasdair MacIntyre), are not so sure. . . .
>
> What Kant would describe as [a conflict] between moral obligation and sentiment, or between reason and sentiment, is, on a non-Kantian account of the matter, a conflict between one set of loyalties and another set of loyalties. The idea of a *universal* moral obligation to respect human dignity gets replaced by the idea of loyalty to a very large group--the human species.

Like Finnis's natural-law moral philosophy, Kantian moral philosophy seems utterly bereft of the resources needed to provide a plausible secular response to the ground-of-normativity question that engages us here: Do we have conclusive reason to to be(come) the kind of person the morality of human rights claims that we should be, a person who strives never to violate any human being, never to treat any human being as if she lacks inherent dignity; a person who strives always to respect the inherent dignity of every human being?[115]

VII. So What if There Is No Plausible Response?

Assume, dear reader, that neither Sarah's nor any other religious response to the ground-of-normativity question that engages us here is plausible. Assume, too, that no secular response is plausible. So what? What difference does it make?

Richard Rorty would certainly reject both Sarah's position and Finnis's position, because Rorty rejects *any* position, secular as well as religious, that relies on the idea of human nature:

> [H]istoricist thinkers [ever since Hegel] have denied[:] that there is such a thing as "human nature" or the "deepest level of the self." Their strategy has been to insist that socialization, and thus historical circumstance, goes all the way down, that there is nothing 'beneath' socialization or prior to history which is definatory of the human. Such writers tell us that the question "What is it to be a human being?" should be replaced by questions like "What is it to inhabit a rich twentieth-century democratic society?"[116]

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[115] Neo-Kantian efforts fare no better. See, e.g., Christine M. Korsgaard with G.A. Cohen, Raymond Geus, Thomas Nagel, and Bernard Williams, The Sources of Normativity (Onora O'Neill, ed., 1996); Alan Gewirth, Reason and Morality, chs. 1-2 (1978); Alan Gewirth, The Community of Rights, ch. 1 (1996). On why Korsgaard's argument fails, see Joyce, The Myth of Morality, n. #, at 123-33. On why Gewirth's argument fails, the published literature is voluminous; my favorite critique is unpublished: Timothy S. Bishop, "Gewirth on the Justification of Moral Rights" (undated; on file with author). The fundamental problem with arguments such as Gewirth's and Korsgaard's is that they overlook the "notorious gap between accepting that my own self-determination is of value to me and others' self-determination is of value to them, on the one hand, and me valuing their self-determination, on the other. I can come to recognise that valuing for me and valuing for them have the same *structure*, but it does not automatically follow that I should assign the same *value* to them . . ." Fabian Freyenhagen, Book Review, Notre Dame Philosophical Reviews 2006-09-23.

[116] Richard Rorty, Contingency, Irony, and Solidarity xiii (1989).

Rorty writes approvingly of "this historicist turn", which, he says, "has helped free us, gradually but steadily, from theology and metaphysics--from the temptation to look for an escape from time and chance. It has helped us substitute Freedom for Truth as the goal of thinking and of social progress."[117] In his embrace of the cause of human rights, Rorty relies on what we may call "Eurocentric" sentiments: the sentiments of twenty-first-century North Americans and Western Europeans. Rorty refers, at one point, to "our Eurocentric human rights culture".[118] As Bernard Williams observed: "Rorty is so insistent that we cannot, in philosophy, simply be talking about human beings, as opposed to human beings at a given time. . . . Rorty . . . contrasts the approach of taking some philosophical problem and asking . . . 'What does it show us about *being human*?' and asking, on the other hand, 'What does the persistence of such problems show us about *being twentieth-century Europeans*?"[119]

Rorty counsels that we abandon what he calls "human rights foundationalism",[120] which, in Rorty's estimation, has proven a futile project.[121] Worse, it is an "outmoded" project.[122] (I understand the project of trying to respond to the ground-of-normativity question to be at least one version of the project Rorty calls "human rights foundationalism".) There is, Rorty suggests, a better project for those of us who embrace the cause of human rights: "We see our task as a matter of making our own culture--the human rights culture--more self-conscious and more powerful, rather than demonstrating its superiority to other cultures by an appeal to something transcultural", like human nature, created or evolved.[123]

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[117] Id.

[118] Rorty, "Human Rights, Rationality, and Sentimentality," n. #, at 126.

[119] Bernard Williams, "Auto-da-Fé," New York Rev., Apr. 28, 1983, at 33.

[120] Rorty, "Human Rights, Rationality, and Sentimentality," n. #, at 116.

[121] See, e.g., id. at 124-25: "Kant's account of the respect due to rational agents tells you that you should extend the respect you feel for people like yourself to all featherless bipeds. That is an excellent suggestion, a good formula for secularizing the Christian doctrine of the brotherhood of man. But it has never been backed up by an argument based on neutral premises, and it never will be."

[122] Id. at 116.

[123] Id. at 117. See id. at 117-18. See also Rorty, Contingency, Irony, and Solidarity, n. #, ch. 9 ("Solidarity"). In this regard, Rorty stands in stark contrast to John Paul II, who was a religious defender of the morality of human rights, and to Noam Chomsky, who is a secular defender.

> The great concern of our contemporaries for historicity and for culture has led some to call into question . . . the existence of "objective norms of morality" valid for all peoples of the present and the future, as for

We should try to convert others to our human rights culture, says Rorty--to our local "we", to our Eurocentric sentiments and preferences--partly through a process of "manipulating sentiments, [of] sentimental education,"[124] a process in which we tell "sad and sentimental stories".[125] Rorty suggests that

> the rhetoric we Westerners use in trying to get everyone to be more like us would be improved if we were more frankly ethnocentric, and less professedly universalist. It would be better to say: Here is what we in the West look like as a result of ceasing to hold slaves, beginning to educate women, separating church and state, and so on. Here is what happened after we started treating certain distinctions between people as arbitrary rather than fraught with moral significance. If you would try treating them that way, you might like the results.[126]

For many (most?) of us who embrace the cause of human rights, the fundamental wrong done, when the inherent dignity of any human being is not respected--when any human

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> those of the past. . . . It must certainly be admitted that man always exists in a particular culture, but it must also be admitted that man is not exhaustively defined by the same culture. . . . [T]he very progress of cultures demonstrates that there is something in man which transcends those cultures. This "something" is precisely human nature: This nature is itself the measure of culture and the condition ensuring that man does not become the prisoner of any of his cultures, but asserts his personal dignity by living in accordance with the profound truth of his being.

John Paul II, Veritatis Splendor, 23 Origins 297, 314 (1993).

> A vision of future social order is . . . based on a concept of human nature. If in fact man is an indefinitely malleable, completely plastic being, with no innate structures of mind and no intrinsic needs of a cultural or social character, then he is a fit subject for the "shaping behavior" by the state authority, the corporate manager, the technocrat, or the central committee. Those with some confidence in the human species . . . will try to determine the intrinsic human characteristics that provide the framework for intellectual development, the growth of moral consciousness, cultural achievement, and participation in a free community.

Noam Chomsky, For Reasons of State 404 (1973).

[124] Rorty, "Human Rights, Rationality, and Sentimentality," n. #, at 122.

[125] Id. at 119.

[126] Rorty, "Justice as a Larger Loyalty," n. #, at 19-20.

being is violated--is not that our local ("Eurocentric") sentiments are offended. The fundamental wrong done is that, somehow, the very order of the world--the *normative* order of the world--is transgressed.

> Outside our philosophical study . . . we don't think we're merely "expressing our acceptance" of norms calling for mutual respect and social justice when we make (sometimes great) personal sacrifices in order to comply with these norms. We act as if we think that the authority of these norms is not "in our heads" or traceable only to social conventions and our (cognitive or affective) reactions to them, but "real".[127]

For many of us who embrace the cause of human rights, the fundamental wrong done at Auschwitz and the other Nazi death camps, for example, was not that our local sentiments were offended, but that the normative order of the world was violated. Given Sarah's understanding of the normative order of the world, Auschwitz constitutes, for Sarah, a terrible violation of who God is, of what the universe is, and, in particular, of who we human beings are.

Now, we might be quite wrong to believe--it might be a false belief--that the world has a normative order one transgresses whenever one violates any human being. But if we are wrong, if our belief is false--at least, if we have no reason to be other than agnostic about the issue--and if we nonetheless coerce others, and perhaps even, at the limit, kill others, in the name of protecting the inherent dignity of human beings, then, *pace* Rorty, aren't we coercing and killing in the name of nothing but our local sentiments and preferences, our Eurocentric human rights culture? Does Rorty want us to say something like this: "It's a brutal world out there. It's either them or us--either their sentiments and culture or ours. It's not that might makes right. It's that there is no right, only might. May our might, not theirs, prevail!" Rorty did once say something like that: "[W]hen 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.'"[128]

Against the background of Rorty's comments, let us ask: Should we who embrace the cause of human rights abandon "human rights foundationalism"; should we abandon the project of trying to ground, whether on religious or secular premises, the claim that every human being has inherent dignity and is inviolable? If we were to abandon the project of trying to ground that claim, what would we then be left with? Our Eurocentric sentiments and preferences?[129] ("When the secret police come . . .") How much weight these sentiments and

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[127] Jean E. Hampton, The Authority of Reason 120 (Richard Healey, ed., 1998). Thanks to George Wright for calling this passage to my attention.

[128] Richard Rorty, Consequences of Pragmatism xlii (1982).

[129] We would be left with a morality based on rational self-interest, but such a morality is too slender a reed to bear the cause of human rights. David Gauthier's *Morals By Agreement* (1987), which is an example of such a morality, is illustrative. (Cf. Robert

preferences would be able to bear--and for how long--is an open question. Listen to the Polish

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Sugden, "The Contractarian Enterprise," in David Gauthier & Robert Sugden, eds., Rationality, Justice and the Social Contract: Themes from *Moral By Agreement* 1, 8 (1993): "At the core of [Gauthier's project] is the thought that traditional moral theory relies on the supposed existence of entities, such as God or goodness, which are external to human life yet somehow matter. A defensible morality should dispense with such mysterious entities, and accept that life has no meaning outside itelf.") Gauthier argues "that rational persons will recognize a role for constraints, both unilateral and mutual, in their choices and decisions, that rational persons would agree ex ante on certain mutual constraints were they able to do so, and that rational persons will frequently comply with those mutual constraints in their interactions." David Gauthier, "Rational Constraint: Some Last Words," in Peter Vallentyne, ed., Contractarianism and Rational Choice: Essays on David Gauthier's *Morals By Agreement* 323, 330 (1991). As Peter Vallentyne observes, "[Gauthier's] main interest is to give an account of rational and impartial constraints on conduct. If this does not capture the traditional conception of morality, so much the worse for the traditional conception. Rationality--not morality--is the important notion for him." Peter Vallentyne, "Gauthier's Three Projects," in id. at 1, 2. Vallentyne's next comment helps us see the chasm between a morality like Gauthier's and a morality that can support human-rights-claims:

> [Gauthier's contractarian] view of the relationship between the individual and society has some implications about which even the most committed contractarians are uneasy. If justice is wholly a matter of reciprocity, do we have any obligation to support people who are so severely handicapped that they can offer us nothing in return? . . . Gauthier has to concede that the handicapped lie 'beyond the pale of morality tied to mutuality'; if we have moral duties in these cases, [Gauthier's] theory cannot account for them. Each of us may feel *sympathy* for the handicapped, and if so, the welfare of the handicapped will be among the ends we pursue; but this is a matter of preference, not moral obligation.

Id. It is not only the handicapped that lie beyond the pale of a morality of rational self-interest; it is also all those other persons around the world--the weakest of the weak, the most marginalized of the marginalized--whom we in rich, powerful nations need not fear and whose cooperation to achieve our goals we need not secure.

Gauthier has written that *Morals By Agreement* "is an attempt to challenge Nietzsche's prescient remark, 'As the will to truth . . . gains self-consciousness . . . morality will gradually perish'. It is an attempt to write moral theory for adults, for persons who live consciously in a post-anthropomorphic, post-theocentric, post-technocratic world. It is an attempt to allay the fear, or suspicion, or hope, that without a foundation in objective value or objective reason, in sympathy or in sociality, the moral enterprise must fail." David Gauthier, "Moral Artifice," 18 Canadian J. Philosophy 385, 385 (1988). In the end, however, Gauthier does not challenge Nietzsche so much as he embraces a Nietzschean conception of justice. Nietzsche wrote: "Justice (fairness) originates among those who are approximately *equally powerful*, as Thucydides . . . comprehended correctly. . . . [J]ustice is repayment and

poet and Nobel Laureate, Czeslaw Milosz:

> What has been surprising in the post-Cold War period are those beautiful and deeply moving words pronounced with veneration in places like Prague and Warsaw, words which pertain to the old repertory of the rights of man and the dignity of the person.
>
> I wonder at this phenomenon because maybe underneath there is an abyss. After all, those ideas had their foundation in religion, and I am not over-optimistic as to the survival of religion in a scientific-technological civilization. Notions that seemed buried forever have suddenly been resurrected. But how long can they stay afloat if the bottom is taken out?[130]

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exchange on the assumption of an approximately equal power position. . . . Justice naturally derives from prudent concern with self-preservation; that means, from the egoism of the consideration: 'Why should I harm myself uselessly and perhaps not attain my goal anyway?'" Friedrich Nietzsche, "All Too Human," in Basic Writings of Nietzsche 148 (Walter Kaufmann, tr., 1973). I suspect that if we abandon the claim that every human being is inviolable, all we will be left with is a Nietzschean morality that not only cannot support, but that is deeply hostile to, many of the most basic human-rights-claims that we who embrace the cause of human rights want to make.

[130] Czeslaw Milosz, "The Religious Imagination at 2000," New Perspectives Quarterly, Fall 1997, at 32. See also Gaita, n. #, at xviii-xix:

> [T]he 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. On credit, so [to] speak, from this language of love, we have built a more tractable structure of rights and obligations. If the language of love goes dead on us, however, if there are no examples to nourish it, either because they do not exist or because they are no longer visible to us, then talk of inalienable natural rights or of the unconditional respect owed to rational beings will seem lame and improbable to us. Indeed, exactly that is happening.

In e-mail discussion, Steve Smith has written:

> Insofar as humans have the quality of "dignity" or (as I prefer) "sacredness," perceptive sincere persons may well be able to perceive that quality without even knowing or giving much thought to the "ground" of the quality. So they don't need to believe in God in order to accord this respect to human beings. Their understanding would be seriously incomplete, of course, but their moral commitment might still be perfectly sincere.

Perhaps some who have no ground--who find any religious ground implausible but can discern no plausible secular ground--are more confident about their conviction that every human being has inherent dignity and is inviolable than they would be about any possible ground for their conviction. ("I have reached bedrock and this is where my spade is turned."[131]) Perhaps some will say that they have no time to obsess about possible grounds for their conviction because they are too busy doing the important work of "changing the world".[132] But, still, this question intrudes: If, as their (bedrock?) conviction holds, the

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> The problems arise when (a) they try to give a secular account of this quality--because the account will be deficient--and/or (b) they affirmatively embrace a naturalist cosmology of the sort you associate with Darrow and Weinberg, because that cosmology will tend to subvert their initial more innocent perception of the sacredness of life. In other words, "sacredness" won't be intelligible in the naturalist ontological worldview, and so the worldview and the moral commitment will be inconsistent.
>
> But even so, insofar as people are able to maintain inconsistencies (and many of us are prodigiously talented at that), they can hold both to a naturalist worldview and to genuine moral commitments, including commitments to human rights.

E-mail from Steven Smith to Michael Perry, Mar. 18, 2005. This seems right to me--though the accommodation that Smith describes seems to me ultimately unstable.

[131] Ludwig Wittgenstein, Philosophical Investigations, sec. 217 (1953), quoted in Hilary Putnam, The Many Faces of Realism 85 (1987).

[132] See Amartya Sen, "Elements of a Theory of Human Rights," 32 Philosophy & Public Affairs 315, 317 (2004):

> Human rights activists are often quite impatient with such critiques. The invoking of human rights tends to come mostly from those who are concerned with changing the world rather than interpreting it (to use a classic distinction made famous, oddly enough, by that overarching theorist, Karl Marx). It is not hard to understand their unwillingness to spend time trying to provide conceptual justification, given the great urgency to respond to terrible deprivations around the world. This proactive stance has its practical rewards, since it has allowed immediate use of the colossal appeal of the idea of human rights to confront intense oppression or great misery, without having to wait for the theoretical air to clear.

Sen then adds, however:

> However, the conceptual doubts must also be satisfactorily addressed, if

Other, *even the Other,* truly does have inherent dignity and truly is inviolable, what *else* must be true; *what must be true for it to be true that the Other has inherent dignity and is inviolable?* That question brings us back to something I said early in this Essay: The morality of human rights is deeply problematic for many secular thinkers, because that morality is difficult--perhaps to the point of impossible--to align with one of their fundamental convictions, what Bernard Williams called "Nietzsche's thought": "[T]here is, not only no God, but no metaphysical order of any kind . . ."[133]

Again, the point is not that morality cannot survive the death of God. There is not just one morality; there are many.[134] The serious question is whether a particular morality--*the morality of human rights*--can survive the death (or deconstruction) of God. (Was it such a morality Nietzsche saw in the coffin at God's funeral?) Nietzsche's thought ("not only no God, but no metaphysical order of any kind") and the morality of human rights (every human being has inherent dignity and is inviolable) are deeply antithetical to one another. Which will prevail?[135]

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> the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing. It is critically important to see the relationship between the force and appeal of human rights, on the one hand, and their reasoned justification and scrutinized use, on the other.

[133] See n. #.

[134] Including, for example, David Gauthier's Nietzschean morality, which has no need for God. See n. #.

[135] Cf. Timothy P. Jackson, "The Theory and Practice of Discomfort: Richard Rorty and Pragmatism," 51 Thomist 270, 284-85 (1987):

> [T]he loss of realism . . . means the loss of any and all realities independent of or transcendent to inquiry. In this respect, God must suffer the same fate as any other transcendent subject or object. Because faith makes sense only when accompanied by the possibility of doubt, Rorty's distancing of scepticism means a concomitant distancing of belief in "things unseen." He, unlike Kant, denies both knowledge and faith; but for what, if anything, is this supposed to make room? Faith may perhaps be given a purely dispositional reading, being seen as a tendency to act in a certain way, but any propositional content will be completely lost. The pull toward religious faith is at best a residue of metaphysical realism and of the craving for metaphysical comfort. The taste for the transcendent usually associated with a religious personality will find little place in a Rortian world. Similarly, hope and love, if thought to have a supernatural object or source, lose their point. The deconstruction of God must leave the pious individual feeling like F. Scott Fitzgerald after his crackup: "a feeling that I was standing at twilight on a deserted range, with an empty rifle in my hand and the targets down." The deconstructed heart is ever restless, yet the theological virtues stand only

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as perpetual temptations to rest in inauthenticity. We live in a world without inherent *telos*; so there simply is no rest as Christianity has traditionally conceived it.

Chapter 1

LIBERAL DEMOCRACY AND HUMAN RIGHTS[1]

Two of the most important political-moral ideas--and ideals--of modern times are liberal democracy and human rights. We cannot fully understand the former idea(l) without reference to the latter.

Not every country that advertises itself as democratic is in fact democratic. (The formal name of East Germany was the German Democratic Republic [*Deutsche Demokratische Republik*].) We must distinguish between true (authentic, genuine) democracy and *faux* democracy. What is true--or, as we call it, "liberal"--democracy? Not everyone will give precisely the same answer, but according to a common--and attractive--account, which I accept, a *liberal* democracy is a democracy[2] committed, first, to the proposition that each and

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[1] c 2008, Michael J. Perry. This is a preliminary draft. Please treat accordingly.

[2] See Andrew Koppelman, "Talking to the Boss: On Robert Bennett and the Counter-Majoritarian Difficulty," 95 Northwestern U.L. Rev. 955, 956-57 (2001):

> [Joseph] Shumpeter . . . proposes the following, more modest definition of democracy: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." The people influence political decisions by voting in elections and "do not control their political leaders in any way except by refusing to reelect them or the parliamentary majorities that support them." . . .
>
> The politician is vulnerable to losing his office unless he continuously manages to attract votes. This creates an incentive for him to pay attention to what voters want. And this incentive guarantees that, in a democracy, the government will not act in a way that attracts the wrath of an electoral majority--or, if it does, that it won't keep it up for long.

(Quoting Joseph A. Shumpeter, Capitalism, Socialism, and Democracy (3d ed. 1950).) According to Koppelman, "[Joseph] Shumpeter is entirely free of . . . mushy sentimentalism about majoritarianism . . ." Id. at 956. See also Richard A. Posner, "Enlightened Despot," New Republic, Apr. 23, 2007, at 53, 54: "Political democracy in the modern sense means a system of government in which the key officials stand for election at relatively short intervals and thus are accountable to the citizenry."

every human being has inherent dignity and is inviolable and, second, to certain human rights.[3] A democracy is committed to the proposition that every human being has inherent dignity and is inviolable if in the political culture of the democracy the proposition is axiomatic; a democracy is committed to certain human rights if in the legal system of the democracy the rights are recognized and protected as fundamental legal rights. The two commitments are connected: As I explain in this chapter, commitment to the proposition that every human being has inherent dignity and is inviolable is a principal reason for--a principal ground of--commitment to the law of human rights.[4]

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[3] For example, philosopher Thomas Nagel has written that "[t]he term 'liberalism' applies to a wide range of political positions . . . But all liberal theories have this in common: they hold that the sovereign power of the state over the individual is bounded by a requirement that individuals remain inviolable in certain respects . . . The state . . . is subject to moral constraints that limit the subordination of the individual to the collective will and the collective interest." Thomas Nagel, "Progressive but Not Liberal," New York Rev. of Books, May 25, 2006. Similarly, philosopher Charles Larmore has argued that "our commitment to [liberal] democracy . . . cannot be understood except by appeal to a higher moral authority, which is the obligation to respect one another as persons." Charles Larmore, "The Moral Basis of Political Liberalism," 96 J. Philosophy 599, 624-25 (1999). Cf. Samuel Brittan, "Making Common Cause: How Liberals Differ, and What They Ought To Agree On," Times Lit. Supp., Sept. 20, 1996, at 3, 4:

> [P]erhaps the litmus test of whether the reader is in any sense a liberal or not is Gladstone's foreign-policy speeches. In [one such speech,] taken from the late 1870s, around the time of the Midlothian campaign, [Gladstone] reminded his listeners that "the sanctity of life in the hill villages of Afghanistan among the winter snows, is as inviolable in the eye of almighty God as can be your own . . . that the law of mutual love is not limited by the shores of this island, is not limited by the boundaries of Christian civilization; that it passes over the whole surface of the earth, and embraces the meanest along with the greatest in its unmeasured scope." By all means smile at the oratory. But anyone who sneers at the underlying message is not a liberal in any sense of that word worth preserving.

Listen, too, to Herman Melville: "But this august dignity I treat of, is not the dignity of kings and robes, but that abounding dignity that has no robed investiture. Thou shalt see it shining in the arm that wields a pick or drives a spike; that democratic dignity which, on all hands, radiates without end from God Himself! The great God absolute! The centre and circumference of all democracy! His omnipresence, our divine equality!" Herman Melville, Moby Dick 126 (Penguin Classics ed. 1992).

[4] The proposition that every human being has inherent dignity and is inviolable is not the only ground of the law of human rights. See Michael J. Perry, Toward a Theory of Human Rights: Religion, Law, Courts 25-26 (2007). But it is, as I am about to explain, the principal ground articulated by the international law of human rights.

I call the proposition that every human being has inherent dignity and is inviolable "the morality of human rights", by which I mean the the morality that grounds--that is a principal ground of--the law of human rights. In this chapter I elaborate the morality of human rights and then explain both how the morality of human rights grounds the law of human rights and why most liberal democracies, including the United States, entrench certain human rights laws in their constitutions.

I. The Morality of Human Rights

Although it is only one morality among many, the morality of human rights has become the dominant morality of our time; indeed, unlike any morality before it, the morality of human rights has become a truly global morality.[5] (Relatedly, the language of human rights has become the moral *lingua franca*.[6]) Nonetheless, the morality of human rights is not well understood. What does the morality of human rights hold?

The International Bill of Rights, as it is informally known, consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[7] The

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[5] This is not to say that the morality of human rights is new; in one or another version, it is a very old morality. See Leszek Kolakowski, Modernity on Endless Trial 214 (1990) (explaining that "the notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality"). Nonetheless, the emergence of the morality of human rights in international law, in the period since the end of World War II, is a profoundly important development: "Until World War II, most legal scholars and governments affirmed the general proposition, albeit not in so many words, that international law did not impede the natural right of each equal sovereign to be monstrous to his or her subjects." Tom J. Farer & Felice Gaer, "The UN and Human Rights: At the End of the Beginning," in Adam Roberts & Benedict Kingsbury, eds., United Nations, Divided World 240 (2d ed. 1993).

[6] See Jürgen Habermas, Religion and Rationality: Essays on Reason, God, and Modernity 153-54 (Eduardo Mendieta, ed., 2002): "Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victim of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity."

[7] The Universal Declaration was adopted and proclaimed by the General Assembly of the United Nations on Dec. 10, 1948. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which are treaties and as such are binding on the several state parties thereto, were meant, in part, to elaborate the various rights specified in the Universal Declaration. The ICCPR and the ICESCR were each adopted and opened for signature, ratification, and

Universal Declaration refers, in its preamble, to "the inherent dignity . . . of all members of the human family" and states, in Article 1, that "[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood." The two covenants each refer, in their preambles, to "the inherent dignity . . . of all members of the human family" and to "the inherent dignity of the human person"--from which, the covenants insist, "the equal and inalienable rights of all members of the human family . . . derive."[8]

According to the International Bill of Rights, then, and also according to the constitutions of many liberal democracies,[9] the morality of human rights--the morality that grounds the law of human rights--consists of a twofold claim, the first part of which is that *each and every human being has equal inherent dignity.*[10]

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accession by the General Assembly of the United Nations on Dec. 16, 1966. The ICESCR entered into force on Jan. 3, 1976, and as of June 2004 had 149 state parties. The ICCPR entered into force on Mar. 23, 1976, and as of June 2004 had 152 state parties. The United States is a party to the ICCPR but not to the ICESCR. In October 1977, President Jimmy Carter signed both the ICCPR and the ICESCR. Although the United States Senate has not ratified the ICESCR, in September 1992, with the support of President George H. W. Bush, the Senate ratified the ICCPR (subject to certain "reservations, understandings and declarations" that are not relevant here; see 138 Cong. Rec. S 4781-84 (daily ed. Apr. 2, 1992)).

[8] The relevant wording of the two preambles is as follows:

> *The State Parties to the present Covenant,*
>
> *Considering* that . . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.
>
> *Recognizing* that these rights derive from the inherent dignity of the human person.
>
> . . .
>
> *Agree* upon the following articles: . . .

[9] See David Kretzmer & Eckart Klein, eds., The Concept of Human Dignity in Human Rights Discourse v-vi, 41-42 (2002); Mirko Bagaric & James Allan, "The Vacuous Concept of Dignity," 5 J. Human Rights 257, 261-63 (2006). See also Vicki C. Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse," 65 Montana L. Rev. 15 (2004).

[10] As a descriptive matter, the morality of human rights holds not that every human being has inherent dignity, but only that every *born* human being has inherent dignity. See Perry, Toward a Theory of Human Rights, n. #, at 54. Except when discussing abortion, as I

o *The Oxford English Dictionary* gives this as the principal definition of "dignity": "The quality of being worthy or honourable; worthiness, worth, nobleness, excellence."[11]

o To say that every human being has "inherent" dignity is to say that the fundamental dignity every human being possesses, she possesses *not* as a member of one or another group (racial, ethnic, national, religious, etc.), *not* as a man or a woman, *not* as someone who has done or achieved something, and so on, *but simply as a human being*.[12]

o To say that every human being has "equal" inherent dignity is to say that having inherent dignity is not a condition that admits of degrees: Just as no pregnant woman can be more--or less--pregnant than another pregnant woman, no human being can have more--or less--inherent dignity than another human being. According to the morality of human rights, "[a]ll members of the human family are born . . . equal in dignity . . . ." Hereafter, when I say "inherent dignity", I mean "equal inherent dignity".[13]

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do in chapter 4 of this book, I generally bracket the born/unborn distinction and say simply that according to the morality of human rights, every human being has inherent dignity. I argue elsewhere that we who affirm that every born human being has inherent dignity have good reason to affirm as well that every unborn human being has inherent dignity. See id. at 54-59.

[11] Oxford English Dictionary (2d ed. 1991). Cf. Christopher McCrudden, "Human Dignity," Oxford Legal Studies Research Paper Series No. 10/2006, available at http://papers.ssrn.com/abstract=899687.

[12] The ICCPR, in Article 26, bans "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See Peter Berger, "On the Obsolescence of the Concept of Honor," in Stanley Hauerwas & Alasdair MacIntyre, eds., Revisions: Changing Perspectives in Moral Philosophy 172, 176 (1983): "Dignity . . . always relates to the intrinsic humanity divested of all socially imposed roles or norms. It pertains to the self as such, to the individual regardless of his position in society. This becomes very clear in the classic formulations of human rights, from the Preamble to the Declaration of Independence to the Universal Declaration of Human Rights of the United Nations." Cf. Charles E. Curran, "Catholic Social Teaching: A Historical and Ethical Analysis 1891-Present 132 (2002): "Human dignity comes from God's free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God. . . . Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor, young or old; male or female; healthy or sick."

[13] For a skeptical account of talk about inherent dignity, see Bagaric & Allan, n. #. "Dignity is a vacuous concept." Id. at 269.

The second part of the claim is that *the inherent dignity of human beings has a normative force for us, in this sense: We should live our lives in accord with the fact that every human being has inherent dignity; that is, we should respect--we have conclusive reason to respect--the inherent dignity of every human being.*[14]

There is another way to state the twofold claim that is the morality of human rights: Every human being has inherent dignity *and is "inviolable"*: not-to-be-violated.[15] According to the morality of human rights, one can violate a human being either explicitly or implicitly. One violates a human being *explicitly* if one explicitly denies that she (or he) has inherent dignity. (The Nazis, for example, explicitly denied that the Jews had inherent dignity.[16]) One violates a human being *implicitly* if one treats her as if she lacks inherent dignity, either by doing do to her what one would not do to her, or by refusing to do for her what one would not refuse to do for her, if one genuinely perceived her to have inherent dignity. (Even if the Nazis had not explicitly denied that the Jews had inherent dignity, they would have implicitly denied it: The Nazis did to the Jews what no one would have done to them who genuinely perceived the Jews to have inherent dignity.) In the context of the morality of human rights, to say that (1) every human being has inherent dignity and we should live our lives accordingly (i.e., in a way that respects that dignity) is to say that (2) every human being has inherent dignity and is inviolable: not-to-be-violated, in the sense of "violate" just indicated. To affirm the morality of human rights is to affirm the twofold claim that every human being has inherent dignity and is inviolable.

Although it is, as I said, the dominant morality of our time, the morality of human rights is just one among many moralities in the world today.[17] By a "morality" I mean a

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[14] I say that the morality of human rights consists of a *twofold* claim, rather than that it consists of two claims, as a way of emphasizing that according to the morality of human rights, the claim that every human being has inherent dignity is not an independent claim but is inextricably connected to the further claim that we should lives our lives in a way that respects the inherent dignity of every human being.

[15] *The Oxford English Dictionary* gives this as the principal definition of "inviolable": "not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault." Oxford English Dictionary (2d ed. 1991).

[16] See Michael Burleigh & Wolfgang Wipperman, The Racial State: Germany, 1933-1945 (1991); Johannes Morsink, "World War Two and the Universal Declaration," 15 Human Rights Q. 357, 363 (1993); Claudia Koonz, The Nazi Conscience (2003).

[17] Many moral philosophers write as if there were just one morality--or, at least, just one correct understanding of the term "morality". (They do this, no doubt, because many moral philosophers share an understanding of the term. See Jean Porter, "Christian Ethics and the Concept of Morality: An Historical Inquiry," 26 J. Society of Christian Ethics 3, 4 (2006).) Three examples:

claim or set of claims about kind of life one should live, where "one" is some or all human beings and "should" means "has conclusive reason to".[18] (By "the kind of life one should live" I mean to include "the kind of person one should be" and "the kind of choices one should, and should not, make".) The morality Adolph Hitler espoused is radically different

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First: Some write about "the moral point of view" as if there were just one moral point of view. For example, in commenting on "that sort of impartiality that constitutes the moral point of view", James Griffin has written that "[w]e all agree that to look at things morally is to look at them, in some sense or other, impartially, granting every person some sort of equal status. Of course, we should have to make this notion of equal status more determinate--say through one interpretation or other of the Ideal Observer or Ideal Contractor. In any case, principles of equality can be principles of impartiality in this sense: they can express the spirit with which one will, if one is moral, consider the facts of the matter." James Griffin, Well-Being 239 (1987). As Bernard Williams observed, "[i]t is often thought that no concern is truly moral unless it is marked by this universality. For morality, the ethical constituency is always the same: the universal constituency. An allegiance to a smaller group, the loyalties to family or country, would have to be justified from the outside inward, by an argument that explained how it was a good thing that people should have allegiances that were less than universal." Bernard Williams, Ethics and the Limits of Philosophy 14 (1985).

Second: Some address the question "Why be moral?" as if there were just one thing it means to be moral. See, e.g., Peter Singer, Practical Ethics 314-35 (2d ed. 1993). Singer writes that the "why be moral" question

> is a question about the ethical point of view, asked from a position outside it. But what is "the ethical point of view"? I have suggested that a distinguishing feature of ethics is that ethical judgments are universalisable. Ethics requires us to go beyond opur own personal point of view to a standpoint like that of the impartial spectator who takes a universal point of view.

Id. at 317.

Third: Some argue that morality is a "myth" (or worse) as if there were just one morality. See, e.g., Richard Joyce, The Myth of Morality (2001). Cf. Brian Leiter, "Morality Critics," in Brian Leiter & Michael Rosen, eds., The Oxford Handbook of Continental Philosophy --- (2008). Relatedly, some opine about the biological and/or social determinants of morality as if there were just one morality. See, e.g., Richard Joyce, The Evolution of Morality (2006).

[18] Cf. Stephen Darwall, The Second-Person Standpoint: Morality, Respect, and Accountability 26 (2006): "[M]oral obligations always give agents conclusive reasons for acting that outweigh or take priority over any potentially competing considerations; or, at least, that always purport to do so."

from the morality Mahatma Ghandi espoused; nonetheless, each is a morality.[19] "Hitler's 'morality' is *not* a morality," you reply, "because it is, to put it mildly, false. There is only one true morality, and Hitler's--least of all Hitler's--is not it!" But to say that there are many moralities is to say nothing about whether a particular morality--or indeed any morality--is true. (Moral skepticism, properly understood, is the position not that morality is false--again, there is not just one morality--but that *every* morality is false, that *every* claim or set of claims about the kind of life one should live is false.) There are many moralities--and the morality Hitler espoused is one of them.

> Asking oneself "Should I care about others?" is not a question prior to moral thought nor a question about morality, but is rather a question *within* morality. Hate and envy are as much "moral" emotions as love and sympathy. Another way to see this is to note that we should consider immoral judgments as a subset of moral judgments; bad moral values as a subset of moral value; false moral theories . . . are still moral theories about how to live.[20]

Of course, just as one can acknowledge that there are many moralities and reject every one of them as false, one can acknowledge that there are many moralities and accept a particular morality as true--accept as true, that is, the claim that one has conclusive reason to live a certain kind of life.

A morality may purport to be true for all human beings, by claiming that all human beings have conclusive reason to live the kind of life it claims all human beings should live. Or a morality may purport to be true only for some human beings. Either way, a morality may be false in one sense but partly true in another: Some, but only some, of the human beings for whom the morality purports to be true may have conclusive reason to live the kind of life the morality claims they should live. Conceivably, two (or more) moralities may both be true, or both be partly true, in this sense: One morality may be true for those, or for some of those, for whom it purports to be true, and another morality may be true for those, or for some of those, for whom it purports to be true.

Notice that it would beg the question to say to someone that the conclusive reason she has for living the kind of life a morality claims she should live is just that that kind of life is (for her) moral: The question is precisely whether the kind of life the morality claims she should live is (for her) truly moral; she wants to know whether in fact she has conclusive reason to live the kind of life the morality claims she should live.

The "ground of normativity" question--as I call it--can be asked about any morality; to ask it about a particular morality is simply to ask whether (and for whom) the morality is true and, if so, why--in virtue of what--it is true. Again, to say that a particular morality is true

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[19] See Claudia Koonz, The Nazi Conscience (2003).

[20] Paul Bloomfield, Book Review, 116 Mind 176, 178 (2007) (reviewing Joyce, The Evolution of Morality, n. #).

(for one) is to say that one should live--that one has conclusive reason to live--the kind of life the morality claims one should live; put another way, it is to say that one has conclusive reason to be (become) the kind of person who lives the kind of life the morality claims one should live. So to ask whether a particular morality is true is to ask what conclusive reason one has, if any, to live the kind of life the morality in question claims one should live. To ask the ground-of-normativity question about a particular morality is to ask what grounds the "should" in the morality's claim that one should live a certain kind of life; it is to ask why--in virtue of what--one should live that kind of life.

Let's ask the ground-of-normativity question about the morality of human rights, according to which every human being has inherent dignity and is inviolable. Again, to say that every human being is inviolable is to say that no human being should be violated: We, each and everyone of us, should refrain from violating any human being; we should respect--we have conclusive reason to respect--the inherent dignity of every human being; we have conclusive reason to live our lives in accord with the fact that every human being has inherent dignity. *If* it is true, *why* is it true--*in virtue of what* is it true--that we have conclusive reason to respect the inherent dignity of every human being?[21] That the International Bill of Rights is (famously) silent on that question is not surprising, given the plurality of religious and nonreligious views that existed among those who bequeathed us the Universal Declaration and the two covenants.[22] Indeed, the claim that every human being is inviolable is deeply problematic for many secular thinkers, because the claim is difficult--perhaps to the point of impossible--to align with one of their fundamental convictions, which Bernard Williams called "Nietzsche's thought": "[T]here is, not only no God, but no metaphysical order of any kind . . ."[23]

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[21] Cf. Jeff McMahan, "When Not to Kill or Be Killed," Times Lit. Supp., Aug. 7, 1998, at 31 (reviewing Frances Myrna Kamm, Morality, Mortality (Vol. II): Rights, Duties, and Status (1997)): "Understanding the basis of our alleged inviolability is crucial both for determining whether it is plausible to regard ourselves as inviolable, and for fixing the boundaries of the class of inviolable beings."

[22] See Jacques Maritain, "Introduction," in UNESCO, Human Rights: Comments and Interpretation 9-17 (1949). Maritain wrote: "[W]e agree about the rights but on condition that no one asks us why." Id. at 9. (See also Youngjae Lee, "International Consensus as Persuasive Authority in the Eighth Amendment," http://ssrn.com/abstract=959706 (2007): "International human rights treaties are . . . willfully silent about the reasons behind the norms that they adopt.") However, Maritain was wrong: There was agreement *both* about "the rights" (actually, about *some* rights) *and* about a part of the "why": namely, that every human being has inherent dignity. Again, the Declaration explicitly refers, in its preamble, to "the inherent dignity . . . of all members of the human family" and states, in Article 1, that "[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood." So what Maritain should have said was this: "We agree about the rights. We even agree about the inherent dignity--but on condition that no one asks us *why* every human being has inherent dignity."

[23] Bernard Williams, "Republican and Galilean," New York Rev., Nov. 8, 1990, at 45, 48 (reviewing Charles Taylor, Sources of the Self: The Making of Modern Identity (1989)). See Perry, Toward a Theory of Human Rights, n. #, at 14-29. Cf. John M. Rist,

I have explained elsewhere why I am skeptical that there is a plausible secular response to the ground-of-normativity question asked about the morality of human rights.[24] But be that as it may, the morality of human rights--the morality that grounds the law of human rights--is without question the dominant morality of our time.

II. From Morality to Law

Again, by the morality of human rights I mean the morality that grounds--that is the principal ground of--the law of human rights. How, precisely, does the morality of human rights ground the law of human rights?

Again, the morality of human rights holds that every human being has inherent dignity and is "inviolable": not-to-be-violated. So we who affirm the morality of human rights, *because* we affirm it, should do what we can, all things considered--we have conclusive reason

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Real Ethics: Rethinking the Foundations of Morality 2 (2002): "[Plato] came to believe that if morality, as more than 'enlightened' self-interest, is to be rationally justifiable, it must be established on metaphysical foundations . . ."

[24] See Michael J. Perry, "Morality and Normativity," Legal Theory (forthcoming); Perry, Toward a Theory of Human Rights, n. #, at 1-29. Cf. Jürgen Habermas, Time of Transitions 150-51 (2006):

> Christianity has functioned for the normative self-understanding of modernity as more than a mere precursor or a catalyst. Egalitarian universalism, from which sprang the ideas of freedom and social solidarity, of an autonomous conduct of life and emancipation, of the individual morality of conscience, human rights, and democracy. is the direct heir to the Judaic ethic of justice and the Christian ethic of love. This legacy, substantially unchanged, has been the object of continual critical appropriation and reinterpretation. To this day, there is no alternative to it. And in light of the current challenges of the postnational constellation, we continue to draw on the substance of this heritage. Everything else is just idle postmodern talk.

I concur in Brian Schaefer's judgment that "foundationless" approaches to human rights are deeply problematic. See Brian Schaefer, "Human Rights: Problems with the Foundationless Approach," 31 Soc. Theory & Practice 27 (2005) (critiquing the putatively foundationless approaches of Michael Ignatieff and Richard Rorty). See also Serena Parekh, "Resisting 'Full and Torpid' Assent: Returning to the Debate Over the Foundations of Human Rights," 29 Human Rights Q. 754 (2007).

to do what we can, all things considered--to prevent human beings, including government officials, from doing things that violate human beings either explicitly or implicitly.[25] (The "doing" may be a not-doing, a refusal to help.) Moreover, we who affirm the morality of human rights, *because* we affirm it, have conclusive reason to do what we can, all things considered, to *do more than* prevent human beings from doing things that violate human beings: We also have conclusive reason to do what we can, all things considered, to prevent human beings from doing things that, even if they do not violate human beings, even implicitly, nonetheless cause them unwarranted suffering (or other harm). I am referring here to serious, not trivial, human suffering. In Germany during World War II, Dietrich Bonhoeffer observed that "[w]e have for once learned to see the great events of world history from below, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled--in short, from the perspective of those who suffer."[26] If we refuse

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[25] The "all things considered" will be, in many contexts, indeterminate. What Amartya Sen, borrowing from Immanuel Kant, calls the distinction between "perfect" and "imperfect" duties is relevant here--though I would mark the distinction with different terms: "determinate" and "indeterminate" duties. As Sen remarks, "[t]he perfectly specified demand not to torture anyone is supplemented by the more general, and less easily specified, requirement to consider the ways and means through which torture can be prevented and then to decide what one should, thus, reasonably do." Amartya Sen, "Elements of a Theory of Human Rights," 32 Philosophy & Public Affairs 315, 322 (2004). Sen elaborates:

> Even though recognition of human rights (with their associated claims and obligations) are ethical affirmations, they need not, by themselves, deliver a complete blueprint for evaluative assessment. An agreement of human rights does involve a firm commitment, to wit, to give reasonable consideration to the duties that follow from that ethical endorsement. But even with agreement on these affirmations, there can still be serious debates, particularly in the case of imperfect obligations, on (i) the ways in which the attention that is owed to human rights should be best paid, (ii) how the different types of human rights should be weighed against each other and their respective demands integrated together, (iii) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on. A theory of human rights can leave room for further discussions, disputations and arguments. The approach of open public reasoning . . . can definitively settle some disputes about coverage and content (including the identification of some clearly sustainable rights and others that would be hard to sustain), but may have to leave others, at least tentatively, unsettled. The admissibility of a domain of continued dispute is no embarrassment to a theory of human rights.

Id. at 322-23.

[26] Dietrich Bonhoeffer, "After Ten Years: A Letter to the Family and Conspirators," in Dietrich Bonhoeffer, A Testament to Freedom 482, 486 (Geoffrey B. Kelly & F. Burton Nelson, eds.; rev. ed.; HarperSanFrancisco 1995). "After Ten Years" bears the date "Christmas 1942".

to do what we can (all things considered) to prevent human beings from violating human beings or otherwise causing them unwarranted suffering--and by "we" I mean here primarily the collective we, as in "We the People", acting though our elected representatives--we refuse to do what we can to protect the victims *and thereby violate them*: We treat them--"those who suffer"--as if they lack inherent dignity by refusing to do for them what no one would refuse to do for them who genuinely perceived them to have inherent dignity. Primo Levi wrote that "if we see the severe torment that pain is causing, and do nothing, then we ourselves are the Tormenter."[27] Martin Luther King Jr. declared, in the same spirit, that "[m]an's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good."[28] Sometimes we violate a human being not by doing something to hurt her but by refusing to do something to protect her. "Sins against human rights are not only those of commission, but those of omission as well."[29]

To say, in the present context, that an instance of human suffering is "unwarranted" is to say that the act that causes the suffering--even if the act is a refusal to act, a refusal to intervene to diminish the suffering--is not warranted, that it is not justified. Not justified *from whose perspective*? It is scarcely surprising that the act, and therefore the suffering it causes, may be justified from the perspective of those whose act is in question. But theirs is not the relevant perspective. The relevant perspective belongs to those of us who, in coming face to face with the suffering, must decide what, if anything, to do, or to try to do, about it; in making that decision, we must reach our own judgment about whether the suffering is warranted.

We can now see how the morality of human rights grounds the law of human rights; we can now see, that is, how a commitment to the morality of human rights--to the inherent dignity and inviolability of every human being--grounds a commitment to legislating certain rights--more precisely, to legislating certain rights-claims: We who affirm the morality of human rights, *because* we affirm it, should press our elected representatives not to do anything that would violate human beings or otherwise cause them unwarranted suffering; *but we should also press them to legislate certain rights-claims: claims about what may not be done to, or about what must be done for, human beings.* As we have learned in the period since the end of World War II, the law of human rights is an important way of trying to prevent government officials--and others[30]--from violating human beings or otherwise causing them unwarranted suffering.

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[27] I have not been able to locate the source of this statement.

[28] Quoted in Nicholas D. Kristof, "The American Witness," New York Times, March 2, 2005.

[29] Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 133 (1999).

[30] See Henry J. Steiner, "Human Rights: The Deepening Footprint," 20 Harvard Human Rights Journal 7, 9 (2007):

This seems the appropriate point at which to emphasize that "human *right*" is short for "human *rights-claim*": a claim, grounded on the inherent dignity and inviolability of every human being, about what may not be done to, or about what must be done for, human beings. A human-rights-claim is typically either a legal claim or a moral claim: legal, if the claim is about what the law forbids or requires;[31] moral, if the claim is about what morality forbids or requires.[32] (At the beginning of this chapter I said that a democracy is committed to certain human rights if in the legal system of the democracy the rights are recognized and protected as fundamental legal rights. Put another way, a democracy if committed to certain *moral* human-rights-claims if in the legal system of the democracy the claims are recognized and protected as *legal* claims.) Human-rights-claims, both moral and legal, are often universal, in the sense that they specify what those subject to the right may not do to *any* human being or what they must do for *every* human being. But human-rights-claims are not always universal; for example, a human-rights-claim, whether moral or legal, may specify what may not be done to, or what must be done for, just some human beings--children, for example, or impoverished human beings living in an affluent society.

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> Increasingly, international norms and institutions are reaching beyond the state to regulate large categories of non-state actors, from political associations and business corporations to ordinary individuals. They do so directly under international law, through treaty norms defining personal international crimes like crimes against humanity that cover state and non-state actors. They also do so indirectly, and far more broadly, by requiring state parties to protect their population against rights-violating conduct of non-state actors, often through treaties that specify what non-state activity--such as discriminatory corporate employment, or family violence--the state must proscribe and act against. Whatever its accuracy at the movement's foundation, the notion that the human rights movement regulates only state conduct is at best an hisotorical observation. As it develops, human rights law continues to erode the long-standing notion of a public-private diuvide, in the sense of state and non-state actors, where only the former is subject to regulation under international law.

[31] A legal claim that A may not do X to B is a legal rights-claim, because that A has a legal *duty* (obligation) not to do X to B entails that B has a legal *right* that A not do X to him; similarly, a legal claim that A must do Y for B is a legal rights-claim, because that A has a legal *duty* to do Y for B entails that B has a legal *right* that A do Y for him.

[32] I have confessed elsewhere to my discomfort with articulating moral claims in terms of "rights". See Perry, Toward a Theory of Human Rights, n. #, at xii-xiii.

III. Entrenching Certain Human Rights Laws

(With Particular Refernce to the Constitution of the United States)

I said at the beginning of this chapter that (according to a common account) a *liberal* democracy is a democracy committed not only to the inherent dignity and inviolability of every human being but also to certain human rights. And, again, to say that a democracy is committed to certain human rights is to say that the democracy recognizes and protects the rights as fundamental legal rights. As it happens, most liberal democracies, including the United States, recognize and protect, as *fundamental* legal rights, the "certain human rights" to which they are committed by entrenching the rights in their constitutions.

In most liberal democracies some human rights laws are both (1) superior (lexically prior) to ordinary laws and (2) entrenched: *exceedingly difficult, sometimes to the point of practically impossible, to amend or repeal.* A conspicuous example of such a law is the Constitution of the United States, which by its own terms can be amended only by a complex, supermajoritarian political act:

> In the [United States, a constitutional] amendment is permitted only upon completion of supermajority requirements both in Congress and in the states: an amendment must be proposed, either by 2/3 of each House of Congress or by a convention called at the request of the legislatures of 2/3 of the states, and then the proposed amendment must be approved by the legislatures of or conventions in 3/4 of the states. This makes the U.S. Constitution one of the most deeply entrenched [in the world].[33]

It is precisely because it is so difficult to amend or repeal an entrenched law that entrenching certain human rights makes sense. As a commentator on the transition to democracy in South Africa observed, an entrenched "bill of rights was crucial . . . to the whole question of legitimacy of a post-apartheid regime. For its powerful symbolism would establish an arena not just for law, *but would also be a definition of what is, and is not, legitimate in politics.*"[34] This is not to deny that in liberal democracies human rights that are not entrenched also have an important role to play in protecting human dignity and inviolability. In the United States, for example, many important human rights laws--the Civil Rights Act of 1964,[35] to name just one--are not entrenched. But most liberal democracies,

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[33] Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 414 (1999).

[34] Martin Chanock, "A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South Africa Bill of Rights Debate," in Philip Alston, ed., Promoting Human Rights Through Bills of Rights: Comparative Perspectives 392, 394 (1999) (emphasis added).

[35] The Civil Rights Act of 1964, P.L. 88-352, was enacted, inter alia, "[t]o enforce the constitutional right to vote . . ."

including the United States, understandably entrench--by constitutionalizing--some human rights.

The United States Constitution consists mainly of two kinds of provisions:

(1) power-allocating provisions: (a) provisions that establish the national government--or, as it is typically called, the federal government--and allocate power (authority) among the three branches--the legislative, executive, and judicial branches--of the national government; and (b) provisions that allocate power between the national government and the governments of the states; and

(2) power-limiting provisions: provisions that limit the power of government.

Most of the power-limiting provisions, such as the Eighth Amendment's ban on cruel and unusual punishments,[36] articulate what we today recognize as human rights. So although it is more than a charter of human rights, the Constitution is a charter of human rights. Indeed, the Constitution, which is the earliest national charter of human rights in modern history, has been an inspiration for many later such charters,[37] including, in the last generation, the Charter of Rights and Freedoms of the Canadian Constitution (1982)[38] and the Bill of Rights of the South African Constitution (1996).[39]

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[36] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[37] See William J. Brennan, Jr., "The Worldwide Influence of the United States Constitution as a Charter of Human Rights," 15 Nova L. Rev. 1 (1991).

[38] The Canadian Charter of Rights and Freedoms is Part 1 of the Canada's Constitution Act of 1982.

[39] The Bill of Rights is Chapter 2 of the Constitution of the Republic of South Africa (1996). See Christina Murray, "A Constitutional Beginning: Making South Africa's Final Constitution," 23 U. Arkansas at Little Rock L. Rev. 809 (2001); Chanock, n. #. In her essay, Murray reports these interesting details:

> In March 1997, about seven million copies of the new constitution in pocket book size were distributed in South Africa. Four million went to high schools, two million were made available at post offices and another million were distributed to the police, army, prisons, and through civil organizations. These copies of the constitution were available in all eleven official languages and were accompanied by an illustrated guide, *You and the Constitution*, which, in thirty cheerfully illustrated pages, provided an introduction to the constitution.

Murray, supra, at 837.

What human rights are entrenched in the United States Constitution? More precisely, what human rights have "We the People of the United States," who, in the words of the Preamble to the Constitution, "do ordain and establish this Constitution for the United States of America", constitutionalized and thereby entrenched?

The original Constitution--the Constitution that was drafted in 1787 and entered into force in 1789--contains only three legal claims that fit the relevant profile: claims about what government may not do or about what it must do, aimed at preventing goverment from violating human beings or otherwise causing them unwarranted suffering. Article I, Section 9, which is directed to Congress, states:

> The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public safety may require it.
>
> No Bill of Attainder of ex post facto Law shall be passed.

Article III, Section 3 states:

> The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

It is mainly in the Bill of Rights (1791) and the other amendments to the original Constitution that we find legal claims that fit the relevant profile.[40] The Bill of Rights, which I have reproduced in an appendix to this chapter, consists of the first ten amendments to the Constitution.[41] Although the Bill of Rights was directed only to the federal government, not

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[40] However, not all the rights (rights-claims) in the Bill of Rights fit the relevant profile; not all Bill-of-Rights rights are human rights in the relevant sense. For example, the Bill of Rights provides, in the Seventh Amendment, that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." Few if any of us today would argue that the right to have a jury rather than a judge decide one's civil case where the amount in controversy exceeds twenty dollars--or even twenty million dollars--is a human right.

[41] However, the Tenth Amendment--which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"--is about the allocation of power between the national government and the governments of the states.

Like some other constitutional scholars, Daniel Farber reads the Ninth Amendment--which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"--to protect certain human rights. See Daniel A. Farber, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (2007). An an historical matter, however, Farber's reading of the Ninth Amendment is extremely problematic. See Kurt T.

to the governments of the states, it is now constitutional bedrock that the Fourteenth Amendment (1868) makes the most important provisions of the Bill of Rights applicable to the states.[42] So, it is not just the federal government but state government too that may not, inter alia, prohibit the free exercise of religion, abridge the freedom of speech, or inflict cruel and unusual punishments.[43]

The three post-Civil War Amendments--the Thirteenth, Fourteenth, and Fifteenth Amendments--contain important human rights provisions. According to the Thirteenth Amendment (1866):

> Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

According to the Fourteenth Amendment (1868):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

According to the Fifteenth Amendment (1870):

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The other amendments that contain human rights provisions all concern the right to vote. The Nineteenth Amendment (1920) echoes the Fifteenth Amendment:

(con't)

Lash, "A Textual-Historical Theory of the Ninth Amendment," Stanford L. Rev. (forthcoming, 2007). Nothing I say in this book assumes that the Ninth Amendment protects any human rights. Indeed, given section one of the Fourteenth Amendment, whose meaning I explicate in chapter 3, there is no need to read the Ninth Amendment to protect any human rights.

[42] As I have explained elsewhere, a constitutional doctrine is constitutional bedrock if the doctrine is well-settled and there is no significant support--in particular, among the political elites--for abandoning the doctrine. See Michael J. Perry, We the People: The Fourteenth Amendment and the Supreme Court 19-23 (1999).

[43] For the most impressive argument in support of the claim that the Fourteenth Amendment was meant, inter alia, to make the most important provisions of the Bill of Rights applicable to the states, see Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986).

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

According to the Twenty-fourth Amendment (1964):

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or by any State by reason of failure to pay any poll tax or other tax.

According to the Twenty-sixth Amendment (1971):

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.[44]

The United States Constitution is silent about the fundamental moral ground of the human rights it entrenches. For that, we must look elsewhere--first and foremost to the Declaration of Independence, which affirms "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness ..." Those famous words, written in 1776, anticipate the twofold claim that is the morality of human rights: Every human being has inherent dignity and is inviolable. Charles Black contended for "the appropriateness of the Declaration as a *basis* for law, as a *nourisher* of law, whether or not it be taken to be law of its own unaided force."[45]

What are the human rights to which liberal democracy--as distinct from *faux* democracy--is, as such, committed? That is, what are the human rights that a democracy recognizes and protects as fundamental legal rights if the democracy is truly a *liberal*

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[44] It bears mention that although the human rights provisions of the Constitution protect human beings, so do, in their own, indirect way, the power-allocating provisions of the Constitution: the provisions that allocate power among the three branches of the federal government or between the federal government and the governments of the states. See, e.g., J. Harvie Wilkinson III, "Our Structural Constitution," 104 Columbia L. Rev. 1687 (2004).

[45] Black, A New Birth of Freedom, n. #, at 8.

democracy? The principal such rights are included among the various rights set forth in the Universal Declaration of Human Rights and, more elaborately, in the International Covenant on Civil and Political Rights.[46] I focus in this book on three of the most important such rights: the right to the freedoms of speech, press, and association, the right to equal citizenship, and the right to religious and moral freedom.[47] One of my principal concerns, in the next three chapters, is the United States Supreme Court's construal of the rights. In the final chapter of this book, I turn to the contested issue of the Supreme Court's proper role in adjudicating controversies that implicate one or more of the three rights.

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[46] See n. #.

[47] Why don't I focus on more than just those three rights? For no better reason than the limits of my scholarly expertise.