

## ABSTRACT

Title of Dissertation: BEING HUMAN, BEING GOOD: THE SOURCE AND SUMMIT OF UNIVERSAL HUMAN RIGHTS

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This dissertation uses the concept of universal human rights to explore the relationship between the individual, society and truth. The Universal Declaration of Human Rights, written in the wake of World War II, was meant to provide a moral standard for judging the state's treatment of the individual. Yet to this day some contend that the principles expressed therein are not universal, but culturally relative. The dominant arguments for universality, however, are themselves relativistic because they are not grounded in the idea of a natural order that supplies objective standards of value. The result is not a morally neutral explanation of human dignity, but a new moral philosophy altogether, that upholds personal autonomy as its highest good. But this position ultimately undermines human rights, for it entails that what is understood to be human is not fixed, but determined by the most powerful elements of society.

How did we arrive at this point of wishing to say something universally true about human beings even while lacking the philosophical means to do so coherently?

To answer this, I explore the changing relationship between truth and politics from Plato to Locke. Plato and Aristotle saw truth as essential to the proper ordering of individual and political life. Christianity concurred, but held that knowing truth was no longer the sole province of philosophers. Machiavelli rejected transcendent standards as inadequate for politics. Modern political philosophy actually begins with Grotius, who, in reaction to Machiavelli's political realism, constructs a natural law philosophy divorced from the idea of objective good. This leads inevitably to Locke's non-theistic natural law and the elevation of human will to the level of the sacred, thus resulting in the current crisis of understanding in universal human rights.

The only logical ground for the concept of universal human rights is Thomistic natural law. An investigation of Aquinas's notion of being and goodness reveals that the only truly universal human rights are to life and free will. Applying this principle yields the conclusion that if human rights are to have any meaning whatsoever, there can never be a "human right" to abortion.

BEING HUMAN, BEING GOOD:  
THE SOURCE AND SUMMIT OF UNIVERSAL HUMAN RIGHTS

by

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## **Dedication**

To my sons,  
David, Joseph, Dominic, and Andrew

Fight the good fight; finish the race; keep the faith.  
(2 Tm 4:6.)

## Acknowledgments

This work, seven years in the making, owes its completion to the many people who have provided help along the way. It would be difficult to overstate my debt of gratitude to Charles Butterworth. Writing a dissertation is daunting enough; doing so in a non-academic setting while raising small children would have been impossible were it not for his personal attention to my progress and well being. Possessing an unwavering commitment to the cultivation of intellectual virtue that is complemented by great kindness and unfailing good humor, he is the kind of scholar and teacher I hope to be. Aristotle once said that it is not possible to have many friends in the fullest sense of the word, who love what is truly good and sincerely wish this for another. I am very fortunate to count Charles Butterworth as one of my true friends.

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It should be noted that this work would never have been completed were it not for the love and support of my “friend of friends,” my husband Dave, and his devotion to our four children. On weekend mornings too numerous to count, he took complete charge of the boys while I retreated to the relative tranquility of the study to write. It sounds cliché, but is nevertheless true: As with everything else in marriage, this accomplishment is as much his as it is mine. I would also like to thank my sons,

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Finally, it goes without saying, but should be said anyway, that I gratefully acknowledge the One who alone deserves credit for whatever is true or good in this work: *Deo Gratias!*



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## Introduction

*None can love freedom heartily, but good men; the rest love not freedom, but license.*

*- John Milton*

Rights discourse is like respiration in the American body politic. Rights are so integral to our understanding of the relationship between citizen and society that invoking them is nearly as reflexive as breathing. This is inevitable to a certain extent, given the fact that our nation was founded on the principle of natural rights -- the idea that because human beings have an inviolable worth that is logically prior to the establishment of government, the most important rights are recognized, rather than conferred. All other positive rights, such as those enumerated in the Constitution, are seen as ultimately having their source in the basic natural rights of life, liberty and the pursuit of happiness.

And so, perhaps because of the importance of natural rights to our political culture; perhaps because of a certain linguistic carelessness by which rights terminology is employed as a shorthand way to speak about what is morally right; perhaps because of a sense among the citizenry that the government ought to provide them with what is good, we find today that almost any issue of social importance is couched in the language of rights. This implies that the law is essential to the achievement of the good life. And yet, we need only peruse the daily newspaper, sample the offerings of television and cinema, or consult the typical college professor or recent Supreme Court

ruling to discern the attitude that the human dignity upon which natural rights are founded is so indefinable and open-ended that the only proper response for the law is to avoid any pretense whatsoever of acting as a moral guide in the conduct of human life. The founding principles of our nation are increasingly considered to be not life and liberty, but rather, liberty and life. Autonomy is regarded as *the* fundamental right; from which all others necessarily flow. Life itself, once regarded as the law's chief occupation, is now thought to be at the service of personal freedom. This places the individual person, once the focus of the law's protection, at risk of being subsumed within a greater concern for rights themselves. Thus, modern man will easily "proclaim his social sympathy and strike a militant posture in defense of rights, but he can no longer explain why that biped who conjugates verbs should be the bearer of 'rights.'"<sup>1</sup> In our relentless search for autonomy, we have lost our sense of what it means to be human. This fact is most salient in the field of bioethics, where the very definition of man is subject to continuous alteration in order to accommodate increasingly ambitious attempts to exert human control over life and death.

The ideal of untrammelled individual autonomy that is waved like a flag nearly everywhere today grows out of a worldview which supposes that objective principles of right and wrong do not exist, or are irrelevant to the conduct of human life. Thus, it is supposed, there are no ultimate limits that need to be respected, and man is absolutely free to make of himself whatever he likes. But we should think very carefully before pledging our allegiance to such a view, for we must ask ourselves what we stand to gain

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1. Arkes, Hadley, *Natural Rights and the Right to Choose* (Cambridge: Cambridge University Press, 2002), p. 2.

once we cross the line between recognizing the inviolable moral worth of the individual, and holding the individual in such high regard that he becomes the source of value itself. Man's unbridled conquest of nature culminates in the idea that the last frontier to be conquered is *human* nature. But once this battle is won, we must ask, with C.S. Lewis, "Who, precisely will have won it?" For "the power of Man to make himself what he pleases means the power of some men to make other men what *they* please . . . There neither is nor can be any simple increase of power on Man's side. Each new power won *by* man is a power *over* man as well. Each advance leaves him weaker as well as stronger."<sup>2</sup>

Once we eschew the objective values that gave meaning to the words "good" and "evil," and presume that the meaning of these words is to be left entirely to the determination of the individual, the end result is necessarily a society where the parameters of humanity and moral worth are set by those with the power to do so. But then, by what principle are the powerful to decide what is good? In fact, "At the moment of Man's victory over Nature, we find the whole human race subjected to some individual men, and those individuals subjected to that in themselves which is purely 'natural' – to their irrational impulses. Nature, untrammelled by values, rules the Conditioners and, through them, all humanity. Man's conquest of Nature turns out, in the moment of its consummation, to be Nature's conquest of Man."<sup>3</sup> Rights which are asserted outside the context of man's integral connection to both society and truth

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2. Lewis, C.S., "The Abolition of Man," (1943), *The Essential C.S. Lewis*, ed. Lyle W. Dorsett (New York: Touchstone, 1988), pp. 450-51.

3. *Ibid.*, 454.

necessarily result not in man's liberation, but in the exploitation of the weaker elements of society by the stronger, who are but slaves themselves to their own unchecked appetites.

In *The Republic*, Socrates suggests that he and his young interlocutors move their discussion of justice from the level of the individual to that of the city, which being larger, would make justice "easier to observe closely." (369a) In like fashion, we will look to the existence of universal human rights as an example of the relationship between the individual, society and objective truth writ large. For to consider the meaning of natural rights on the international level is necessarily to understand them in their most fundamental sense.

Unlike the Declaration of Independence, the Universal Declaration of Human Rights was intentionally written without reference to a Creator in the attempt to recognize in secular (read "nondenominational") terms the objective moral principles necessary to the just ordering of the relationship between citizen and state. Even at the time of its creation, the Declaration was challenged by those who contended that the values expressed therein did not represent universal values. This debate has only grown over time, and today academic journals, library shelves and U.N. documents are crammed with various explanations of the universality of human rights. Within this camp is another debate regarding which specific human rights are paramount. Regardless of the various ways in which they are defined, human rights are essentially thought to represent the inviolable moral worth, or dignity of the human being.

But an examination of the topic yields the conclusion that the present day defenders of universal human rights are not philosophically equipped to support their case since they are attempting to articulate a vision of universal human nature that is not dependent upon objective moral principles. That is to say, they are incapable of justifying the universality of human rights because they insist on defining them outside of the conceptual universe from which such rights derive their meaning.

And yet, the very existence of the Universal Declaration of Human Rights and the general respect with which the idea of human rights is regarded does tell us something about the relationship between humanity and the world. The struggle to recognize a dignity adhering naturally in the human being, independent of government fiat, indicates that our deepest yearnings are for a good beyond the political realm. But in what does our dignity reside? Starting with the assumption that ontological questions are too “controversial” to be useful in articulating a vision of human rights, modern defenders of universal human rights take man himself as the highest good. Seeking transcendence apart from truth, mankind worships itself, at the expense of the weakest elements of society. The person is understood not as the human being simply, but as the autonomous human. This results not in authentic human rights, but in a travesty of rights, as the language of rights is merely a device for legitimizing the interests of the strong.

How did we get to this point? What can explain our philosophical impoverishment when it comes to understanding and explaining human dignity in a way that is not subject to whim, and how can we find our way out of this dilemma? In an

attempt to answer these questions, this dissertation is largely an examination of the relationship between the individual, truth, and the political order.

Chapter 1 explores the emergence and justification of the idea of universal human rights in international law. The concept of human rights represents an entirely new principle in international politics in its assumption that individuals, and not just states, are the proper subject of international law. The Universal Declaration of Human Rights was written largely in reaction to what was Naziism's total disregard for objective moral principles. It was meant to provide a moral basis for judging the state's treatment of the individual.

Nevertheless, the debate persists as to whether human rights are truly universal, and applicable to all people in all times, or culturally relative, and dependant upon specific contexts. But in examining the dominant arguments for universality, we find that they are themselves relativistic and incapable of supporting their own tenets. This is because each one argues for the concept of universality apart from the idea of a natural order which supplies objective standards of value. But this does not really offer the hoped-for morally "neutral" explanation of human dignity, but results instead in a new moral philosophy which posits personal autonomy as the highest good. Thus, the current philosophical justifications for universal human rights, pursued to their logical conclusions, actually undermine the idea of human dignity, thus threatening to replace the "hard," obvious tyranny which human rights language was devised to combat with a "soft" tyranny – less discernible and therefore, perhaps, all the more insidious.



Chapters Two and Three are concerned with the question of how we got to this point, which is the position of wanting to say something about human beings that is universally true, but lacking the ability to do so in a logically consistent manner. These chapters examine the changing relationship between truth and political philosophy from Plato to Locke. The ancients upheld the importance of truth to the political order, sometimes at the expense of individual happiness; the moderns focused on the happiness of the individual to the point of disregard for truth. Spanning this yawning gap is the advent of Christianity, which upholds both the human person and objective truth in equal measure. Chapter 3 argues that modern rights philosophy properly begins with Grotius and Locke, who, in reacting to the gauntlet of political realism tossed down by Machiavelli, and to Christianity itself, construct a political philosophy that is ultimately divorced from the idea of objective good. This leads inevitably to our current crisis of understanding in human rights.

The logic of natural law is the only anchor capable of keeping human rights from bobbing aimlessly about in a sea of meaninglessness. If truth does not exist, then neither do human rights. Therefore, in Chapter 4, we reconsider the question of human rights from the perspective of natural law. Using St. Thomas as our guide, we begin once again from the standpoint of an ordered universe to ponder the meaning of human nature. This yields the conclusion that if human rights are to be based in anything other than the raw exercise of power, there can be no human “right” to abortion.

It may well be that all of the goods that are enumerated in the Universal Declaration of Human Rights -- such as the rights to work, leisure, health care and

material comfort, and even the right to a democratic form of government -- are not really rights in the proper sense of the term. But it is clear that to we cannot plausibly suggest that these goods nevertheless *ought* to be provided without first recognizing that human beings are integrally tied to one another as part of an ordered whole.

## **Chapter 1: Universal Human Rights and the Impoverishment of Moral Discourse**

*Lead us, Evolution, lead us  
Up the future's endless stair;  
Chop us, change us, prod us, weed us.  
For stagnation is despair;  
Groping, guessing, yet progressing  
Lead us nobody knows where.*

*Wrong or justice in the present,  
Joy or sorrow, what are they  
While there's always jam to-morrow,  
While we tread the onward way?  
Never knowing where we're going,  
We can never go astray.*

*To whatever variation  
Our posterity may turn  
Hairy, squashy, or crustacean,  
Bulbous-eyed or square of stern,  
Tusked or toothless, mild or ruthless,  
Towards that unknown god we yearn.*

*Ask not if it's god or devil,  
Brethren, lest your words imply  
Static norms of good and evil  
(As in Plato) throned on high;  
Such scholastic, inelastic,  
Abstract yardsticks we deny.*

*On then! Value means survival –  
Value. If our progeny  
Spreads and spawns and licks each rival,  
That will prove its deity  
(Far from pleasant, by our present  
Standards, though it well may be).*

*From "Evolutionary Hymn," by C.S. Lewis*

On December 10, 1948, the United Nations General Assembly, without a single dissenting vote, adopted the Universal Declaration of Human Rights. “The mightiest nations on earth bowed to the demands of smaller countries for recognition of a common standard by which the rights and wrongs of every nation’s behavior could be measured.”<sup>1</sup> Indeed, the Universal Declaration became instrumental in spurring changes “that would amplify the voices of the weak in the corridors of power.”<sup>2</sup> It challenged the idea that the conduct of a sovereign state toward its citizens was strictly its own business. It heralded the fall of colonial empires and influenced numerous postwar constitutions, including those of Germany, Japan and Italy. It inspired the international human rights activists who try to hold governments accountable to their promises.<sup>3</sup>

Today, the concept of human rights is an essential element in the discourse of international relations. Every nation professes concern for human rights, paying lip service to the idea even if they have no intention of complying with human rights treaties. “There is thus a broad, if shallow consensus that states – even in anarchic international relations – should respect the individual and collective human rights of

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1. Glendon, Mary Ann, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), xv.  
2. *Ibid.*, xvi.  
3. *Ibid.*, xvi.

persons.”<sup>4</sup> This represents a fundamental shift in the mindset governing international relations:

The emergence of human rights policy is not a simple victory of ideas over interests. Instead, it demonstrates the power of ideas to reshape understandings of national interest. The recent adoption of human rights policies did not represent the neglect of national interests but rather a fundamental shift in the perception of long-term national interests.<sup>5</sup>

### **The History of Human Rights in International Law**

Human rights as we understand them today are the result of a gradual evolution in international law. At least since the Peace of Westphalia in 1648, the key principles of international relations were territorial sovereignty and domestic jurisdiction. This meant that a state’s treatment of individuals within its borders was its own affair. What we consider human rights issues were matters of national jurisdiction. But the emergence of human rights principles, in a sense, represents international law’s formal recognition of the human dignity, or moral worth, of every person.

This idea is certainly not new, nor does it belong exclusively to the West. Indeed, the idea of the dignity of all human beings, and their ensuing obligation toward one another has been present throughout history and across cultures. The emergence of human rights in international law is simply a broad manifestation of this; human rights

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4. Forsythe, David P., “Human Rights Fifty Years After the Universal Declaration: Reconciling American Political Science and the Study of Human Rights,” *PS: Political Science and Politics* 31 (September 1998), p. 507(5); available from [http://web4.infotrac.galegroup.com/itw/infomark/526/83/40554333w4/purl=rcl\\_EAIM-0\\_...](http://web4.infotrac.galegroup.com/itw/infomark/526/83/40554333w4/purl=rcl_EAIM-0_...); Internet; accessed 22 September 2003, p. 2 of 5.

5. Sikkink, Kathryn, “Transnational Politics, International Relations Theory, and Human Rights: A New Model of International Politics is Needed to Explain the Politics of Human Rights,” *PS: Political Science and Politics* 31 (September 1998), p. 517 (5); available from [http://web4infotrac.galegroup.com/itw/infomark/526/83/40554333 w4/purl=rcl\\_EAIM\\_0 ...; Internet; accessed 22 September 2003, p. 3 of 5.](http://web4infotrac.galegroup.com/itw/infomark/526/83/40554333 w4/purl=rcl_EAIM_0 ...; Internet; accessed 22 September 2003, p. 3 of 5.)

law is the codification of the principle of concern beyond one's own self-interest.<sup>6</sup>

Human rights did not really start with Western philosophy, although the West did provide "much greater opportunities for visions such as these to receive fuller consideration, articulation, and eventual implementation."<sup>7</sup>

Of course, even when philosophy proclaimed the equal worth of all persons, this was not always echoed in practice. One can note the discrepancy between the writings on liberty of Locke, Montesquieu, and Mill, for example, and their willingness to apply this principle to colonial peoples.<sup>8</sup> Similarly, the U.S. Constitution, rooted in principles of equality, nevertheless did not initially provide it for blacks, women, Native Americans and the poor.<sup>9</sup> It was not until the nineteenth century that changing conditions brought greater opportunity for uniting the principle of human rights with state practice. As many governments were overthrown by foreign and civil wars, nations became more democratic; liberalism flourished and the idea of state sovereignty was challenged. The forces of modernity simultaneously created an opportunity for greater exploitation of people and the means whereby such mistreatment would be exposed in a way never before possible. As industrialization led to greater exploitation of the worker, the invention of the railroad, steamship and telegraph had the effect of bringing distant places closer, which meant a greater awareness of the conditions of people around the globe. This set the stage for envisioning "the general sentiment of

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6. See Lauren, Paul Gordon, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), 6-11.

7. Ibid., 6.

8. Ibid., 30-31.

9. Ibid., 31.

civilized mankind,” and “the principles of humanity and universal brotherhood.” that would later be articulated by the Universal Declaration of Human Rights.<sup>10</sup>

In international law in the nineteenth century, various exceptions were made to the principle of state sovereignty: to prohibit piracy, to extend protections to sick and wounded combatants as well as prisoners of war, and to set guidelines for state treatment of foreign nationals.<sup>11</sup> Furthermore, the advancement of free market economics helped make abolition an international issue, since goods from non-slave holding countries competed poorly with the cheaper products of slave labor. The creation of the International Committee of the Red Cross in 1863 led to the “Geneva Convention of the Amelioration of the Condition of the Wounded in Armies in the Field of 1864, the first multilateral treaty in history designed to protect the individual in times of war,” which was history’s first multilateral treaty focusing on the protection of individuals in times of war. It required its signatories “to acknowledge and respect the neutrality or immunity of military hospitals and their staffs... in order that they might provide equal medical care for wounded soldiers regardless of their nationality.”<sup>12</sup> This inspired the creation of more treaties, known as “humanitarian law,” “Red Cross law,” or “human rights law in armed conflict.” Unlike the earlier laws of war, which were concerned with things like ships and weapons, humanitarian law dealt with people.<sup>13</sup> By 1899, the Hague Conventions would be explicitly focused on all sorts of rights -- rights of the wounded, rights of surrender, rights of P.O.W.’s and noncombatants. The

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10. Ibid., 37.

11. Shaw, Malcom N., *International Law* (Cambridge: Grotius Publications Limited, 1991), 192.

12. Lauren, *The Evolution of International Human Rights*, 60.

13. Ibid., 61.

establishment of the League of Nations in 1919 brought a new regard for the concerns of fringe groups, since it was believed that discontented minorities in central Europe had helped cause World War I. It was also to provide for the people of former enemy colonies, and to regulate the treatment of minorities as specified in the 1919 peace agreements.<sup>14</sup> But despite their expression of concern for individuals, these treaties still required the cooperation of governments to have an effect.<sup>15</sup> “Concern for individual welfare was framed and confined within the state system” -- when the conditions of individuals either “threatened international order” or “impinged on the economic interests of other countries.”<sup>16</sup>

It was not until the creation of the United Nations Charter in 1945 that the human rights movement really took wing, mostly in reaction to the horrors of Naziism. “Post war leaders either displayed a moral reaction to fascist atrocities, or they believed that states engaging in gross violations of human rights were also likely to violate the law against aggressive war.”<sup>17</sup>

Article 55 of the U.N. Charter pledged to promote relations among nations based on equal rights, to ensure good economic and social conditions, to foster international cooperation, and to create “universal respect for, and observance of, human rights.” This led to the adoption, without a negative vote, of the Universal Declaration of Human Rights in 1948. The Universal Declaration (which is not a treaty) was

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14. Shaw, *International Law*, 193.

15. Lauren, *The Evolution of International Human Rights*, 62-63.

16. Henkin, Louis, *The Age of Rights* (New York: Columbia University Press, 1990), 15

17. Forsythe, David P., *Human Rights and World Politics* (Lincoln and London: University of Nebraska Press, 1989), 10-11.



proclaimed as a “common standard of achievement for all peoples and all nations.” It covered a wide range of rights, from civil and political rights (concerning liberty and security, equality before the law, due process, and freedom of movement and expression) to economic and social rights (such as the right to work, to paid vacations, to social security and to education). Although the declaration is not legally binding by definition, it is still considered legally important. “Some see it as having given content to the Charter pledges, partaking therefore of the binding character of the Charter as an international treaty. Others see both the Charter and the Declaration as contributing to the development of a customary law of human rights binding on all states.”<sup>18</sup>

In 1966 two treaties on international human rights were produced (entering into force ten years later), thus legislating the proclamations of the Universal Declaration. The International Covenant on Civil and Political Rights includes protection of the right to life and freedom from genocide, slavery, torture and discrimination. It protects freedom of movement, expression, religion and conscience, the right to marriage, and the right to due process of law.<sup>19</sup>

The International Covenant on Economic, Social, and Cultural Rights offers myriad goods to individuals, promising that to the extent resources allow, states will take steps to enforce rights ranging from working rights (fair wages, vocational guidance and training, safe conditions, holidays with pay, social security and the freedom to join trade unions and to strike), to protections for the family; to an adequate standard of living (including freedom from hunger and adequate clothing and housing),

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18. Ibid., 19.

19. Ibid., 20.

to the rights to education and participation in cultural life. “Derogations and limitations by law are permitted if they are compatible with the nature of these rights and are solely for the purpose of promoting the general welfare in democratic society.”<sup>20</sup>

In addition to these covenants, human rights are also the subject of international law in The Convention on the Prevention and Punishment of the Crime of Genocide (1948); The International Convention on the Elimination of All Forms of Racial Discrimination (1965); The Convention on the Elimination of Discrimination Against Women (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989).

### **The Universal Declaration of Human Rights: Taking Conscience for a Guide**

In our discussion of the universality of human rights, the Universal Declaration warrants particular attention; the events leading to its drafting, and the intentions of its framers, shed light on the meaning of universality. The experience of World War II was directly responsible for the creation of the Universal Declaration of Human Rights, for Nazi Germany brought to light in a way that seemed unprecedented, the face of moral evil. As Mary Midgley comments on the Nazi rise to power:

Everyone who attended to this process saw, I think, that it was not just a local affair for the Germans but was the business of everyone in Europe... And this was not just because the threat of another war might damage the local interests of people in other nations. It was because of the specific moral moves that the Nazis were making, moves which mattered to everybody. . . . The unbridled nationalism, the propaganda for racism, the justification of brutal methods of repression and the

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20. Ibid.

general cultivation of hatred were the direct concern of us all. These things did not strike us as merely the unavoidable eccentricities of bizarre foreigners but either as evils that we ought to somehow resist or – in the case of those who supported Nazism – as a creed to be welcomed. Nazi Germany, like Stalinist Russia, fell within our own moral universe.<sup>21</sup>

As one of the drafters put it, “the war by its total disregard of the most fundamental rights was responsible for the Declaration.”<sup>22</sup> After WWII, it suddenly seemed urgent to articulate the idea of human dignity -- that is, the idea that all persons possess moral worth, and are valuable apart from their apparent utility -- because Nazi Germany had been directly opposed to this idea. The purpose of the Universal Declaration of Human Rights, then, was to prevent another Holocaust or something like it. “Hearing about and experiencing the horrors of the war convinced the drafters of the rightness of what they were doing. The moral outrage thus created gave them a common platform from which to operate and do the drafting”<sup>23</sup>

The Universal Declaration was a conscious attempt to reject everything Nazi Germany stood for – especially the notion that conscience was simply myth and that there was no principle higher than reason of state. The drafters of the Declaration “adopted numerous articles and clauses precisely because they were collectively outraged by what Hitler had done,” and emphasized that the Declaration was drafted

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21. Midgley, Mary, “Towards an Ethic of Global Responsibility,” *Human Rights in Global Politics*, ed. Tim Dunne and Nicholas J. Wheeler (Cambridge, UK: Cambridge University Press, 1999), 171-72.

22. Morsink, Johannes, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 37.

23. *Ibid.*, 37.

because ‘disregard and contempt for human rights had resulted in barbarous acts which have outraged the conscience of mankind.’<sup>24</sup>

By using the phrase ‘the conscience of mankind’ the drafters generalized their own feelings over the rest of humanity. Taking a position diametrically opposed to Hitler’s, they believed that any morally healthy human being would have been similarly outraged when placed in similar circumstances. This shared outrage explains why the Declaration has found such widespread support.<sup>25</sup>

National Socialism was a totalitarian system, founded on racism, which presumed an “organically indivisible national community” involving “the total breakdown of the dividing line between persons and their state.” To this the principles of Universal Declaration stood diametrically opposed, emphasizing that “the interests of the individual (come) before those of the state and that the state should not be allowed to deprive the individual of his dignity and his basic rights.”<sup>26</sup>

Article I of the Universal Declaration affirms that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Article 2 proclaims that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.” These two articles lay the foundation for the rights which follow, many of which were recognized in reaction to the atrocities committed by Nazi Germany. The political rights enumerated in Articles 18-21, for example, as a result of the war: “Having witnessed the destruction of all democratic rights under National Socialism and having seen them replaced with the abhorrent Fuhrer principle,” the

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24. Ibid., 90-91.

25. Ibid., 91.

26. Ibid., 38.

drafters “had no doubts about these political rights as being genuine human rights. The experience of the war had reinforced their belief that (these) rights . . . are universally the first ones dictators will seek to deny and destroy.”<sup>27</sup>

Article 3 of the Declaration, which recognizes that everyone has the right to “life, liberty and security of person” was particularly important in light of the contempt with which Naziism regarded some human lives. “Hitler had said in *Mein Kampf* that ‘if the power to fight for one’s own health is no longer present, the right to live in this world of struggle ends.’ He did not want any ‘half-measures’ in this respect and therefore opposed letting ‘incurably sick people’” as well as the elderly and insane “steadily contaminate the remaining healthy ones.”<sup>28</sup> Article 4’s prohibition of slavery and servitude was partly in answer to Nazi Germany’s “attenuated forms of slavery which were vigorous in practice: for instance, the status of persons who were deported to Germany was certainly worse than that of ancient slaves.”<sup>29</sup> The Article’s use of the word servitude was meant “to cover such ‘practices as the way in which the Nazis had treated their prisoners of war and the traffic in women and children.’”<sup>30</sup>

Article 5 of the Declaration, which prohibits “torture (and) cruel, inhuman or degrading treatment or punishment” arose in response to the medical experiments conducted in the concentration camps. It clearly rejected the idea that human beings may be subjected to medical experiments or suffering without their consent, even in pursuit of good ends.<sup>31</sup>

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27. Ibid., 69.

28. Ibid., 39.

29. Ibid., 41.

30. Ibid., 41.

31. Ibid., 42.

When the principles of life and liberty are held in contempt, mockery of the law is soon to follow. Thus, the universal Declaration also includes seven articles treating legal human rights, for the drafters realized how far Naziism had compromised the German legal system.<sup>32</sup> Article 6, which says that “everyone has the right to recognition everywhere as a person before the law,” sounded very basic, but was felt to be necessary in light of the fact that leaders like Hitler had determined that people considered to be slaves could not marry, be creditors or property owners.<sup>33</sup> Article 9, which stipulates that “no one shall be subjected to arbitrary arrest, detention or exile” stood opposed to Nazi practice in which the government could always find a “reason” for arrest, “for the standard of legality was whether something conflicted with the German National Socialist world view.”<sup>34</sup> Article 10 says that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Jonathan Morsink catalogs the ways that Naziism was opposed to this principle:

Hitler ruined the independence of the courts by his appointment of Nazi cronies at all levels of the justice system and by the establishment of special courts that dealt with the crimes listed in his own decrees, (including) the doctrine of creative interpretation, which allowed judges to ‘adapt’ the Weimar Constitution to life under the Fuhrer; the teleological method, which led judges to look for an ideological meaning and intent behind and underlying the laws; the concept of a material crime, which was any activity that ran counter to the National Socialist world view . . . the doctrine of grasping the essences, according to which

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32. Ibid., 43.

33. Ibid., 44.

34. Ibid., 49.

judges grasped the whole of a situation and did not linger too much on the details of a case.<sup>35</sup>

If the drafters of the Universal Declaration did not hesitate to boldly affirm the importance of conscience as a guide in human affairs, they were somewhat reticent when it came to illuminating the fount from which that conscience sprung. The principles of liberty, equality and fraternity laid out in Article 1 of the Declaration are basically reiterations of Enlightenment principles of the eighteenth century. But where the thinkers of that era regularly appealed to God or Nature as the source of rights, the drafters of the Declaration purposely avoided such references.<sup>36</sup> This was partially in response to the delegates who were nonbelievers, but also because some delegates believed the principles of God and Nature were in conflict.<sup>37</sup> At any rate, they believed that reference to God was not necessary for reasoning one's way to the existence of rights. Morsink notes:

Most of the religious traditions involved in the drafting allowed for independent access to the basic truths of morality and hence for a secular declaration. This holds for the mainstream Christian – Protestant as well as Catholic – Jewish, Buddhist, Gandhi-like Hindu, and Muslim religions.<sup>38</sup>

The drafters believed that deleting references to God and Nature would not weaken the Declaration since it indicated in various places that rights adhere to human beings *qua* human, and not through governments, courts, or any other outside

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35. Ibid., 50-51.

36. Ibid., 282.

37. See also Ignatieff, Michael "The Attack on Human Rights," *Foreign Affairs*, November 2001/December 2001, 102; available from <http://web.lexis-nexis.com/universe/>; Internet; accessed August 28, 2003, p. 2 of 6.

38. Morsink, *The Universal Declaration of Human Rights*, 285.

agencies.<sup>39</sup> Delegate Rene Cassin later wrote that the term “universal” was meant to show that the Declaration “was morally binding on everyone, not only on the governments that voted for its adoption. The Universal Declaration, in other words, was not an ‘international’ or ‘intergovernmental’ document; it was addressed to all humanity and founded on a unified conception of the human being.”<sup>40</sup> This reinforced the fact that the Declaration was not meant to be a legally binding treaty, but rather to serve as a moral basis for other documents:

(The) view that the Declaration had no legal and only moral force was the nearly unanimous view of the delegations involved in the drafting. There is tremendous philosophical and moral power in this position and it explains why the Declaration has become a moral beacon in the affairs of individuals as well as of states. It is precisely because these rights are inherent in people and not the gifts of history or circumstance that they can be used as standards against which history and circumstance are to be judged.<sup>41</sup>

And yet, despite the determination of the delegates to keep rights “grounded” in what is “human,” the Declaration does point beyond itself. For as Jonathan Morsink notes, the statement in Article 1 that everyone is “endowed with reason and conscience,” is not meant to imply that these are the *basis* of human rights, but are rather the instruments by which we discover that such rights exist. In this sense, the use of the word “conscience” in Article 1 fits well with the use of the phrase “the conscience of mankind” in the Preamble:

The word ‘conscience’ in Article 1 (placed there upon Chinese initiative) and the phrase ‘the conscience of mankind’ in the second recital (placed there upon Western initiative) complement each other. Initiated by

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39. Ibid., 290; see also Glendon, *A World Made New*, 175.

40. Glendon, *A World Made New*, 161.

41. Morsink, *The Universal Declaration of Human Rights*, 295-96.



delegates from very different cultural traditions, they recommend the same way of conscience as a route into the realm of rights.<sup>42</sup>

By using the language they did, they took the position that every normal human being would have had the same reaction when placed in similar circumstances. This is the heart of the classical theory of moral intuitionism . . . which supposes that people everywhere have a moral sense or faculty that –unless it is blocked – gives them unaided access to the basic truths of morality.<sup>43</sup>

Thus, human rights are universal not because they come “from” human beings, but because human nature, possessing reason and conscience, is able to “discover” the values human rights represent. By saying that rights are “recognized, rather than conferred,” the Declaration “implicitly rejected the positivist position” that “there is no higher law by which the laws of nation-states can be judged.”<sup>44</sup> So even though the Declaration was not specific as to the foundation of human nature, it definitely affirmed that human nature is universal.

Metaphysically, the great majority of the drafters accepted the view that human rights are inherent in people and therefore inalienable moral birth rights. And epistemologically the great majority of them accepted conscience and reason as ways of knowing that lead us into that realm of inherent moral rights. These beliefs form a minimal but widespread consensus.<sup>45</sup>

A final point to bear in mind is that the drafters of the Declaration did not see human rights as a *means* of attaining peace, but rather viewed peace as an outcome of respecting human rights. Although true justice and peace certainly require the recognition of the equal worth of all people, “the wanting of this peace does not make

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42. Ibid., 299.

43. Ibid., 300; see also Glendon, *A World Made New*, 147.

44. Glendon, *A World Made New*, 176.

45. Morsink, *The Universal Declaration of Human Rights*, 318.

for or create these inherent rights; these rights are inherent and inalienable and our recognition of that fact and our treatment of people accordingly will help bring about the desired freedom, justice, and peace in the world.”<sup>46</sup> And since the document notes that “disregard and contempt for human rights *have resulted* in barbarous acts which *have outraged* the conscience of mankind,” we should note that “these backward-looking statements are not in themselves aimed at world peace.”<sup>47</sup> Thus, “while the drafters surely thought that proclaiming this Declaration would serve the cause of world peace, they did not think of the human rights they proclaimed as only or merely a means to that end.”<sup>48</sup>

### **Cultural Relativism: The Argument and its Critique**

Despite the best efforts of the framers of the Universal Declaration of Human Rights to achieve a basis for human rights not bound to any particular cultural tradition, the debate has never subsided as to whether there can be such things as universal human rights, or whether human rights are culturally relative. Western capitalist, socialist, and developing nations offer competing conceptions of human rights. Developing countries reject standards rooted in European liberal, democratic traditions for emphasizing civil and political rights over social welfare rights. This points to the broader question of how we are capable of prioritizing rights at all.

Cultural relativists make any one of three claims: The first is simply that societies possess noticeably different moralities due to different cultural, political, and

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46. Ibid., 313.

47. Ibid., 319.

48. Ibid., 320.

social customs. The second, known as “normative relativism,” goes a step further and holds that these different moralities are meaningless outside of their particular cultural context; that is, one society simply cannot determine what is good for another society. The more agnostic third variety, meta-ethical relativism, admits the *possibility* of universal truths, but insists that “no objectively justifiable moral standards or judgments exist outside particular cultural contexts.” In other words, “no valid means exist to objectively justify one culture’s moral values over another’s.”<sup>49</sup> Taken together, these three outlooks indicate the following:

Relativist arguments tend to be based on the general proposition that members of one society may not legitimately judge or condemn the social practices of other traditions. The essence of this relativist argument is the insight that normative values take their meaning primarily from context. At its extreme, relativism denies the existence of legitimate cross-cultural standards for evaluating human rights practices and exempts certain variations in social practices and institutions from external criticism.<sup>50</sup>

Now, if no objective standard exists for judging the acceptability of human rights, and there is no legitimate basis for condemning the social practices of other states, then it logically follows that “local cultural traditions (including religious, political and legal practices) properly determine the existence and scope of human rights enjoyed by individuals in a given society.”<sup>51</sup> The result may be a far cry from a spirit of universal brotherhood. First, some cultures may deem certain values such as universal political participation or equal protection of individuals inappropriate. In

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49. Donoho, Douglas Lee, “Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards,” *Stanford Journal of International Law* 27 (1991), 351-352.

50. *Ibid.*, 352.

51. Teson, Fernando, “International Human Rights and Cultural Relativism,” *Virginia Journal of International Law* 25:4 (1985), 870.

addition, even when abstract rights (such as justice, freedom and equality) *are* accepted, they often mean different things in different cultures. Relativism ultimately endorses this outcome, exempting particular cultures from all external critique by holding that “each state should espouse its own conception of what human rights entail as a social institution based upon its cultural preferences and political ideology.”<sup>52</sup> Practically speaking, universal human rights would be defined not according to unchanging truths, but by the whim of the most powerful members of international society.

But one can use both empirical fact and philosophical argument to undermine the more extreme views of cultural relativism. Empirically speaking, from the standpoint of international law, one can certainly argue for the existence of at least a limited international moral order. For example, the peremptory *jus cogens* norms of international law are regarded by all states as universal. They protect such fundamental values as the right to life and prohibit genocide, torture, slavery, “prolonged arbitrary detention and systemic racial discrimination.”<sup>53</sup> Standing on a higher plane than positive law, they are nonderogable, and may be modified only by the emergence of a subsequent norm of equal character.<sup>54</sup> The mere existence of the United Nations Charter, The Universal Declaration of Human Rights, and other human rights conventions indicates that at a minimum, the *idea* of human rights is important to everyone. This “necessarily implies some degree of common standards, thereby

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52. Donoho, “Relativism Versus Universalism in Human Rights,” 354.

53. Meron, Theodor, “On a Hierarchy of International Human Rights,” *American Journal of International Law* 80 (1991), 11.

54. Parker, Karen and Lyn Beth Neylon, “*Jus Cogens*: Compelling the Law of Human Rights,” *Hastings International and Comparative Law Review* 12 (1989), 415.

necessitating an exception to the fundamental rule of absolute state sovereignty.”<sup>55</sup> In short, international law does reflect *some* core of common values.

Philosophically, relativism is untenable and seems doomed to collapse under the weight of its own logical inconsistency:

It affirms at the same time that (a) there are no universal moral principles; (b) one ought to act in accordance with the principles of one’s own group; and (c), (b) is a universal moral principle . . . If it is true that no moral principles exist, then the relativist engages in self-contradiction by stating the universality of the relativist principle.<sup>56</sup>

In addition, even if the cultural relativist were to argue that there can be no moral principle, except for (b), the argument is epistemologically weak -- for if we are in fact somehow able to discover a single universal principle, why should it be (b), rather than something else?<sup>57</sup>

The outcome of the cultural relativist viewpoint, therefore, is to admit of several normative systems, or of none at all. This of course forces the international community to tolerate under the banner of cultural diversity even the most oppressive regimes, for in fact, these are always the governments that appeal to the principle of cultural diversity as a justification for committing human rights abuses.<sup>58</sup>

Fernando Teson charges that “normative relativism amounts to the worst form of moral and legal positivism: it asserts that the rules enacted by the group are necessarily correct as a matter of critical morality.” It is also extremely conservative,

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55. Donoho, 358.

56. Teson, “International Human Rights and Cultural Relativism,” 888.

57. *Ibid.*, 889.

58. See Jack Donnelly, “Cultural Relativism and Universal Human Rights,” *Human Rights Quarterly* 6 (November, 1984), 412; and Sumner B. Twiss, Abdullah A. An-Na’im, and Ann Elizabeth Mayer, “Universality vs Relativism in Human Rights,” *Religion and Human Rights*, 38.

encouraging states to mimic pre-existing domestic law and practice, regardless of how far they deviate from the principles of human rights.<sup>59</sup> In sum, “normative relativism runs counter to the principle that persons have moral worth *qua* persons and must be treated as ends in themselves, not as functions of the ends of others,” for “this principle of moral worth forbids the imposition upon individuals of cultural standards that impair human rights.”<sup>60</sup>

### **Rights in Non-Western Perspectives**

If the very idea of cultural relativism is so logically inconsistent, then, what can explain its persistence? The answer is that when most people argue in favor of cultural relativism, they are not really arguing for relativism *per se*, but rather, are making the point that the Western conception of the individual does not really speak to the essence of human nature. “The strongest version of cultural relativism challenges the universality of rights on the asserted ground that the core concept of individual rights has no foundation, or at any rate is not deeply rooted, in many cultural traditions”<sup>61</sup> and that what are regarded as universal human rights are simply an “expression above all of Western values derived from the Enlightenment.”<sup>62</sup>

Indeed, as noted earlier in this chapter, although the philosophy of human rights is a relatively new development in history, the value of human dignity which it represents is perennial. In this sense, “human rights are one window through which one

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59. Teson, 893. See also Booth, Ken, “Three Tyrannies,” *Human Rights in Global Politics*, ed. Tim Dunne and Nicholas J. Wheeler (Cambridge, U.K.: Cambridge University Press, 1999), p. 37.

60. Teson, “International Human Rights and Cultural Relativism,” 892-893.

61. Orentlicher, Diane F., “Relativism and Religion,” *Human Rights as Politics and Idolatry*, by Michael Ignatieff (Princeton: Princeton University Press, 2001), 145.

62. *Ibid.*, 141-42.

particular culture envisages a just human order for its individuals.”<sup>63</sup> In fact, the chief difference between Western and non-Western concepts of human rights is the latter’s emphasis on community over individuality. This has two effects: Rights are conceived in terms of the duties they create, as opposed to the freedoms they protect, and order is valued more than freedom for its own sake. The Indian view of human rights is explained in this way:

The individual is just an abstraction, i.e., a selection of a few aspects of the person for practical purposes. My *person*, on the other hand, is also in “my” parents, children, friends, foes, ancestors and successors . . . If you hurt me, you are equally damaging my whole clan, and possibly yourself as well. Rights cannot be individualized in this way . . . Rights cannot be abstracted from duties; the two are correlated.<sup>64</sup>

The non-Western emphasis on community is also found in Islam, as represented in the *1992 Cairo Declaration on Human Rights in Islam*. Like other human rights documents, the Cairo Declaration draws heavily on the language of freedom; but its most striking aspect -- in stark contrast to the 1993 Vienna Declaration and Programme of Action, in particular -- is its emphasis on freedom as *obligation* to community instead of freedom as personal autonomy. The preamble stresses the importance of freedom and dignity “in accordance with the Islamic Shari’ah.” This means that freedom inheres not in the human person *qua* person, but in the human person as created being. As Abdul Aziz Said argues, “Since absolute freedom belongs to God alone, the individual realizes freedom by seeking God . . . To rebel against it in the name of freedom is to become separated from the potency and grace of the Divine and to lose inner freedom,

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63. Panikkar, R., “Is the Notion of Human Rights a Western Concept?” *Human Rights Law*, ed. Philip Alston (New York: New York University Press, 1996), 164.

64. *Ibid.*, 176.

the only real freedom.”<sup>65</sup> The idea that authentic freedom is achieved by uniting individual will with a greater truth is present in all major religions.<sup>66</sup>

In the Muslim view, and, we might add, in the view of all major religions, “human rights exist only in relation to human obligations.”<sup>67</sup> If dignity derives from our status as created beings, the “I” exists only in relation to the other -- to God, who is our final end, and to the community, who, as human beings, share in that end. Right and duty are inextricably linked. Thus, “Muslims recognize human freedom in the context of the community of Islam, but not in accordance with Western secular humanism...The goal of freedom is human creativity, but freedom is defined as belonging to the community and participating in its cultural creation.”<sup>68</sup> Rights are to ensure the well being of the community as well as the individual.

Thinking of rights in terms of obligations to the community often means that order is emphasized over freedom for its own sake. As a result, Asian thinkers point out, “the hard core of rights that are truly universal is smaller than many in the West

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65. Said, Abdul Aziz, “Human Rights in Islamic Perspectives,” *Human Rights: Cultural and Ideological Perspectives*, Editors Adamantia Pollis and Peter Schwab, (New York: Praeger Publishers, 1979), 92.

66. Robert Drinan argues that “All religions share in the belief that somehow God dwells in us. It’s not unique to the Jews or to the Christians; every single person has human rights that are indivisible and prescriptible, inalienable and very sacred. These rights come to us from God. They are inseparable from our very being.” *Religion and Human Rights*, 90.

67. Ibid., 92.

68. Ibid., 93. Also see Monshipouri, Mahmood and Christopher G. Kukla, “Islam, Democracy and Human Rights: The Continuing Debate in the West,” *Middle East Policy* 3 (1994), p. 24: “In marked contrast to the ideals of Western society, Islamic society sees freedoms and rights as means and not ends.”



are wont to pretend.”<sup>69</sup> It is argued, for example, that the protestors in Tiananmen square were motivated not necessarily by a desire for democracy, but rather:

by economic concerns, with inflation and corruption heading the list. Those rights that the demonstrators did seek -- freedom of the press, greater voice in electing officials -- were grounded in pragmatic concerns: a free, investigative press would keep tabs on and expose corrupt officials; elections would allow for the expulsion of those exposed.<sup>70</sup>

This implies that if the Chinese government had been working for the common good in the first place, the cries for democratic freedoms might not have been so shrill. In addition, the Asian sympathy for Tiananmen Square protestors may not have been a sign of agreement with the student’s views as much as a reaction to the excessive force the government used against them. As Bilihari Kausikan notes:

Popular pressures against East and Southeast Asian governments may not be so much for “human rights” or “democracy” but for good government: effective, efficient, and honest administrations able to provide security and basic needs with good opportunities for an improved standard of living.<sup>71</sup>

Of course, concern for order rings hollow if it comes at the expense of the well being of the community. Confucianism dictates that someone becomes an authority “by earning the respect of others. To do so, one must show cultural and moral achievement and demonstrate to others that they are better off following one’s advice than had they set out on their own.”<sup>72</sup> This leads us to the main criticism liberals level at the non-

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69. Kausikan, Bilihari, “Asia’s Different Standard,” *Human Rights Law*, ed. Philip Alston (New York: NYU Press, 1996), 211.

70. Peerenboom, R.P., “What’s wrong with Chinese Rights?” *Toward a Theory of Rights with Chinese Characteristics*, *Harvard Human Rights Journal* 6 (1993), 29-30.

71. Kausikan, “Asia’s Different Standard,” 214.

72. Peerenboom, “What’s Wrong with Chinese Rights?”, 44.

Western perspective -- namely, that its emphasis on order and obedience seems to facilitate tyranny, for the ruler does not always govern in the interest of all. But this is perhaps less a reflection of the *philosophy* of non-Western societies, than evidence of the failure of governments to run according to that philosophy. As Abdullahi An-Na'im argues:

I think the failures that we see are our failures, not the failures of "religion." What is important is the choices we make in our beliefs: not just the name, not the label Muslim or Christian or Jew, but the content of that belief, and not only as we articulate it, but also as we live it.<sup>73</sup>

Thus, although the Cairo Declaration declares that "Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed,"<sup>74</sup> we witness human rights abuses in many Islamic states. The problem, as Ann Elizabeth Mayer notes, is that cultural relativists tend to grant more deference to "governmental assertions that their fidelity to Islam precludes the acceptance of 'Western' international human rights than to the positions of the individual Muslims who have been harmed."<sup>75</sup> James C.N. Paul sums up the issue well:

The problem in many Islamic states may be not so much with Islam as a religion (for it is difficult to believe that a religion, in itself, can be hostile to universal rights), but with those who interpret and apply it to politics and law -- the religious establishment built around Islam.<sup>76</sup>

The point of all this is certainly not that Islam or Confucianism should be universal, but that instead of dismissing religious conceptions of human rights as

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73. *Religion and Human Rights*, 88.

74. *The Cairo Declaration on Human Rights in Islam*, 1992, Article 23.a.

75. Mayer, *Islam and Human Rights*, 15.

76. *Ibid.*, 35.

irrelevant to modern concerns, we should examine the roots of the theology on which religious establishments stake their claims. The key may be not so much in convincing non-liberal societies to adhere to Western ways but, rather, in forcing them to live up to their own standards:

Despite the rhetoric of universal human rights, the reality is that different states have different conceptions and practices with respect to rights, reflecting their own cultural, philosophical, political, ethical and economic traditions. Thus a more productive approach than simply attempting to impose one's own particular rights ideology on another sovereign state is to engage the other on its own terms . . . At a minimum, a country must stand up to scrutiny on its own terms: it must be able to withstand criticism of both its theory (or underlying philosophies) and empirical practice.<sup>77</sup>

The same must be done when evaluating respect for human rights in Western countries. It bears repeating that although the concept of individual worth was emphasized in the Enlightenment, that concept is not a *product* of the Enlightenment. To emphasize the dignity of the individual is not necessarily to advance the superiority of the Western view. As Michael Ignatieff argues:

The declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis. In this sense, human rights norms are not so much a declaration of the superiority of European civilization as a warning by Europeans that the rest of the world should not reproduce their mistakes. The chief of these was the idolatry of the nation-state, causing individuals to forget the higher law commanding them to disobey unjust orders. The abandonment of this moral heritage of natural law and the surrender of individualism to collectivism, the drafters believed, led to the catastrophes of Nazi and Stalinist oppression. Unless the disastrous heritage of European collectivism is kept in mind as the framing experience in the drafting of the declaration, its individualism will appear to be nothing more than the ratification of Western bourgeois

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77. Peerenboom, "What's Wrong with Chinese Rights?", 50.

capitalist prejudice. In fact, it was much more: a studied attempt to reinvent the European natural law tradition in order to safeguard individual agency against the totalitarian state.<sup>78</sup>

The larger task, then, is not to determine how well world religions measure up to Western liberal standards, but rather, to scrutinize religious dictates *and* Western liberalism against an objective standard that transcends both. For all the variation in defining rights, we find that Western and non-Western societies alike do seem to hold certain values in common, and this points to the existence of truth. But, the same truth may be found in a variety of cultural contexts, for “nobody has direct access to the universal range of human experience. We can only indirectly and through a limited perspective come to know the totality . . . Co-existence is only possible on a common ground, a *co-esse* recognized by different parties.”<sup>79</sup>

In order for respect for human rights to take root, the seeds of understanding must be planted not on some high moral plane exclusive to one particular culture, but rather, on the small patch of common ground where all nations stand; this is the idea that every person possesses dignity, or moral worth. It is only when we truly understand what is common to everyone that we can go on to consider what rights are truly universal. The universal standard of measure for human rights might be how well a state’s practices respect the moral worth of every person in its jurisdiction.

We have seen that cultural relativism is logically inconsistent and therefore incapable of standing as any kind of normative philosophy. Some cultural relativists, however, do raise important questions about the ability of Western rights philosophy to

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78. Ignatieff, “The Attack on Human Rights,” 3 of 6.

79. Panikkar, “Is the Notion of Human Rights a Western Concept?” 180.

address the concerns of non-Western states regarding obligation to the community. We must now consider how well the predominant arguments for universality address these concerns.

## **The Arguments For Universality**

### *The Autonomy View*

A proper defense of human rights must begin from the foundation of the human dignity – or moral worth – of each individual. How can this principle be expressed in a way that is truly universal? The predominant arguments for universal human rights are based on what we will call the “autonomy view.” According to this view, dignity resides in individual autonomy, since personal freedom is seen as the most important aspect of human being. But as we shall see, autonomy pursued for its own sake poses serious challenges to the idea of universality.

To understand the autonomy view most fully, we shall first examine the work of Jack Donnelly, arguably one of the most prolific and best-known proponents of universal human rights. Donnelly lays out his argument for universal rights as follows: Rights are universal, because they are the equivalent of human nature, and are therefore possessed by every “member of homo sapiens” everywhere. But human nature, according to Donnelly, is not fixed, but open-ended, the result of self and social creation. Therefore, human rights must ensure the flourishing of “human nature” by upholding individual autonomy. The second premise, however, far from leading logically to Donnelly’s conclusion, actually undermines the point of his argument. Let us see how this happens.

Donnelly's first step is to define rights. He clearly emphasizes that rights are *not* to be confused or equated with dignity. Furthermore, rights are not "benefits, duties," or "privileges," but are rather "special entitlements of *persons*." They are "conceived as naturally inhering in the human person," are inalienable, and held by individuals in relation to society."<sup>80</sup>

Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). They are also *inalienable* rights: one cannot stop being human, no matter how badly one behaves or how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all members of the species *Homo sapiens* "human beings," and thus holders of human rights.<sup>81</sup>

So human rights equal human nature. But in Donnelly's scheme, the fact that a person has inalienable rights tells us nothing about the existence of a moral order; indeed, he takes great pains to distinguish between *having* a right and *knowing* what is right. For example, I may have a moral obligation to give food to a starving man, for helping the needy is the *right* thing to do, but this does not mean that the man *has* a right to my bread. Donnelly subscribes to Dworkin's idea of "rights as trumps" and therefore insists that respecting the rights held by others is of greater importance than simply doing what is right -- "to violate a right goes well beyond merely falling short of some high moral standard."<sup>82</sup> Having a right is presumably more effective than having the knowledge of what is right, since the latter is merely prescriptive, whereas

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80. Donnelly, Jack, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights," *American Political Science Review* 76 (1982), 304-306.

81. Donnelly, Jack, *Universal Human Rights in Theory and Practice: Second Edition* (Ithaca: Cornell University Press, 2003), 10.

82. Donnelly, "Human Rights and Human Dignity," 304.

“claiming a right *makes things happen*.”<sup>83</sup> The contrast between being right and having a right is largely what distinguishes the modern philosophical tradition from classical theories:

The guarantees of life, liberty and property (and increasingly, since the late eighteenth century, beginning with Paine, guarantees of such rights as education and social security) are treated as more than merely right in the sense of what is right, more than simply the righteous demands of God, morality, conscience, or social policy. Rather, they are viewed as the rights of man, as human rights.<sup>84</sup>

For Donnelly, “having” a right is preferable to “knowing” the right because the former is based in human will, whereas the latter is “simply” God’s will. Human nature, it would seem, is easier to define apart from the idea of a moral order. Thus, the idea of an objective standard *outside* human agency is completely irrelevant to the justification of rights. But if this is true, how do we *know* that rights are universal and not simply products of a particular culture? Donnelly explains that rights are universal because they are *equivalent* to human nature:

The ‘nature’ which underlies natural or human rights is the *moral* nature of a human being . . . Since all human beings ‘have’ the same basic nature and have it ‘equally’, the rights based on this nature must be universal and held equally by all.<sup>85</sup>

Human rights attach to all people by virtue of their humanity. In Donnelly’s view, they are not to be thought of as a reflection of one’s proper relation to the moral order or to society -- they are simply one more aspect of human being, as much a part of our genetic makeup as having two arms. Human rights, then, sanction no duty to others

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83. Donnelly, Jack, *The Concept of Human Rights* (London: Croom Helm, 1985), 5.

84. Donnelly, “Human Rights and Human Dignity,” 305.

85. Donnelly, *Concept of Human Rights*, 9.

(apart from respecting their rights in return). Violating someone's human rights is equivalent to denying his nature; to renounce one's own human rights would be to "destroy one's humanity, to de-nature oneself, to become other (less) than a human being."<sup>86</sup> Rights, for Donnelly, are synonymous with human nature.

This of course leads to the question which occupies the second premise of Donnelly's theory: What, exactly, is the human nature that defines human rights? He claims we should define human nature in whatever terms we like, for what is "human" in no way depends upon God or nature:

Human rights are not 'given' to man by God, nature or the physical facts of life; to think of them in such terms is to remain tied to a vision of human rights as things. Like other social practices, human rights arise from human action. Human rights represent the choice of a particular moral vision of human potentiality and the institutions for realizing that vision . . . The human 'nature' that grounds human rights is a moral posit, an essentially moral account of human possibilities . . . the moral nature that grounds human rights is a selection of one set of possibilities.<sup>87</sup>

By this account, human rights seem to be the outward expression of what we consider human nature to be. For Donnelly, however, the definition of human nature is not grounded in an objective moral order, but is largely a matter of choice. He claims that human rights are "needed" for human dignity -- to help us achieve those things required for a specifically human life.

Human rights, then, may be thought of as the tools whereby man realizes a particular vision of human nature, which Donnelly thinks is a "social project more than

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86. Donnelly, "Human Rights and Human Dignity," 306.

87. Donnelly, *Concept of Human Rights*, 31, see also *Universal Human Rights in Theory and Practice*, 14.



a presocial given.”<sup>88</sup> They represent both the nature we “choose,” and the institutions that bring this choice into being. It must logically follow, then, that human nature is determined to a large degree by our type of government:

A government which does in fact protect human rights will radically transform human nature, (for) to the extent that human rights are protected and implemented, they would actually *create* the envisioned person, so long as that vision lay within the limits of human possibility.<sup>89</sup>

If human nature is not fixed by God or nature, then there is no specific limit to what human beings can or should achieve. Indeed, Donnelly implies that human beings can make of themselves whatever they wish, as long as biology permits and the correct political institutions are available. In fact, human rights allow the individual and the state to take turns forming each other:

‘Human nature’ is thus conventional; one’s very nature is in part the result of individual and social actions . . . ‘Human nature’ thus appears as a *project*; just as an individual’s ‘nature’ or ‘character’ results from the interaction of natural endowment, environmental influences, and individual action, the species (or rather society) creates its essential nature out of itself . . . Human rights are less about the way people ‘are’ than about what they might become . . . The relationship between human nature, human rights and political society is thus ‘dialectical’. Human rights shape political society, so as to shape man, so as to realize the possibilities of human nature, which provided the basis for these rights in the first place. And without human rights, the ‘real’ human being is almost certain to be split -- alienated or estranged -- from his (moral) nature . . . the claim of inalienability of human rights is not one of practical impossibility but rather a claim of moral impossibility; one cannot lose such rights and live the life of a human being.<sup>90</sup>

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88. Donnelly, *Universal Human Rights in Theory and Practice: Second Edition*, 15.

89. Donnelly, *Concept of Human Rights*, 31-32.

90. *Ibid.*, 32-34.

So for Donnelly human nature is *conventional* -- there is no specific way to describe it, because it is whatever we want it to be. One cannot look to moral principles to define human nature, he supposes, because moral principles are created by human beings: "Moral and political arguments require a firm place to stand. But that place appears firm largely because we have agreed to treat it as such. 'Foundations' 'ground' a theory only through an inescapably contentious decision to *define* such foundations as firm ground."<sup>91</sup>

"Knowing what is right," implies the existence of an objective moral order. The life that is most fully human is that which is lived in accordance with this order. In Donnelly's scheme, however, to be fully human requires the right political regime. It would seem that human beings are only capable of reaching their potential through a government with the proper human rights policy. Thus, Donnelly explains that even though non-Western traditional cultures may prize Western values like "life, speech, religion, work, health, and education," these are understood "in terms of duties that are neither derivative from nor correlative to rights, or at least not human rights."<sup>92</sup> He finds this problematic indeed, for he although the traditional approach would work in a "relatively decentralized, non-bureaucratic, communitarian society," such a society no longer exists: "Westernization, modernization, development and underdevelopment -- the dominant contemporary social and economic forces -- have in fact severed the individual from the small, supportive community." He concludes that "In such

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91. Donnelly, *Universal Human Rights in Theory and Practice: Second Edition*, 19-20.

92. Donnelly, "Human Rights and Human Dignity," 306.

circumstances, human rights appear as the natural response to changing conditions, a logical and necessary evolution of the means for realizing human dignity.”<sup>93</sup> He further explains:

Prior to the creation of capitalist market economies and modern nation states, the problems that human rights seek to address, the particular violations of human dignity that they seek to prevent, either did not exist or were not widely perceived to be central social problems . . . The rise of a monetized market economy based on largely unlimited private property rights gradually destroyed the social bases of traditional communities and created separate and distinct individuals (in place of persons who are ascriptively defined by their position in a status hierarchy) who would become the bearer of human rights. Modern markets also created a whole new range of threats to human dignity and thus were one of the principal sources of the need and demand for human rights.<sup>94</sup>

Donnelly says that the animating principle of human rights is that of “equal concern and respect” toward all human beings. Since in his view there is no “set” human nature or objective moral standard to which our actions should conform, this principle leads “naturally” to a “political emphasis on autonomy. Personal liberty, especially the liberty to choose and pursue one’s own life, clearly is entailed by the idea of equal respect. For the state to interfere in matters of personal morality would be to treat the life plans and values of some as superior to those of others.”<sup>95</sup> In other words, when human beings have no higher purpose than to “create” themselves, the only type of society in which they can be fully “human” is a liberal society that upholds personal autonomy as its highest value. This leads to the third step of Donnelly’s argument, that

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93. Ibid., 312.

94. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989), 64.

95. Donnelly, *Universal Human Rights in Theory and Practice: Second Edition*, 44.

human beings absolutely must live in liberal society, for only liberalism allows for the degree of autonomy human dignity requires.

*Liberal neutrality* – neutrality bounded by liberal principles – is an expression of the core liberal values of equality and autonomy in a world without indubitable moral and political foundations. If we cannot be certain of the substance of the good life, particularly in its details, and if we are committed to the basic moral equality of all human beings, then a stance of at least principled tolerance is required for all conceptions that respect the equal dignity of human beings.<sup>96</sup>

Overall, there are three major problems with this theory: It is incompatible with the idea of universality, it precludes the sense of community spirit necessary to realize universal rights, and it is subject to the same criticisms Donnelly levels at other concepts of human nature, particularly, natural law.

The most obvious flaw in Donnelly’s theory of “universal” human rights is the logical conundrum he falls into by arguing that although human nature is conventional, the human rights which spring from it apply to all. Although it seems patently impossible to stipulate that human rights can be both historically conditioned *and* universal, Donnelly circumvents the issue by supposing that since “rights are based on universal human potentials” they are held equally by all.<sup>97</sup> He continues:

If human nature is fixed, original sin and its secular analogues present a most serious political problem. An essentially plastic nature, however, directs our attention to the more manageable question of how man is formed by history and society, and how we can intervene in the process.<sup>98</sup>

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96. Ibid., 50.

97. Donnelly, *Concept of Human Rights*, 36.

98. Ibid., 39.

Donnelly's position, then, is essentially this: human nature is not fixed; it is composed of good and bad elements, the former being protected by human rights. Human beings are progressive, though not inevitably so, and human nature is formed, but not fully determined, by historical processes. He thus presents a somewhat attenuated version of historicism. We may say that a single natural right exists, which is the right to potentiality. Human beings have no particular *ends* as such, only (near) limitless moral possibilities. If God or nature is irrelevant to the idea of human being, then we may suppose that human rights and human nature are conventional. Therefore, Donnelly holds autonomy as the defining mark of human dignity, and believes Western liberal institutions to be the sole guarantors of this dignity.

Donnelly's concept of human rights is not unlike Rousseau's general will: both describe phenomena that simultaneously emerge from and determine our behavior. But in subscribing to Rousseau's belief in the plasticity of human nature, Donnelly falls prey to a similar dilemma, for, as Strauss argues, if "man's humanity is the product of the historical process," then to the extent that history is accidental, "it cannot supply man with a standard, and if that process has a hidden purpose, its purposefulness cannot be recognized except if there are trans-historical standards."<sup>99</sup>

In fact, what Donnelly actually seems to support is not the concept of *universal* rights, but of *unanimous* rights. For he notes that "the particular list of rights that we take as authoritative today reflects a contingent response to historically specific conditions . . . our list of authoritatively recognized human rights may change in

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99. Strauss, Leo, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 274.

response to changes in our understanding of human dignity, the emergence of new threats, and social learning concerning the institutions, practices and values necessary to realize that dignity.”<sup>100</sup> Without objective standards, the proposition that human nature can be both freely chosen and universal works only if all societies unanimously “choose” the same nature. But by Donnelly’s logic, there is no reason why they should do so-- for his theory upholds process over end, *choice* over *truth*, as the measure of legitimacy. As a result, the inevitable question is not “What is human nature?” but rather, “*Who shall decide* what is human nature?” Without the existence of an objective moral order, “truth” is necessarily subject to the whim of the strong.

A case in point is Donnelly’s confident supposition that although in the past, “all major regional civilizations have at times been dominated by views that treated some significant portion of human beings as ‘outsiders’ who were not entitled to guarantees that could be taken for granted by ‘insiders,’” this is no longer true, for “the basic moral equality of all human beings is not merely accepted but strongly endorsed by all leading comprehensive doctrines in all regions of the world.”<sup>101</sup> Based on this, one would have to wonder how Donnelly views the practice of abortion; for if its permissibility is really grounded in the principles of liberalism, as most liberals are wont to claim, then this would be an example of a “leading comprehensive doctrine” that *does* claim that some *homo sapiens* are not entitled to full moral consideration. We will return to this point in Chapter 4.

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100. Donnelly, Jack, “The Social Construction of International Human Rights,” *Human Rights in Global Politics*, Ed. Tim Dunne and Nicholas J. Wheeler, 84.

101. Donnelly, *Universal Human Rights in Theory and Practice: Second Edition*, 41.

Even if we were to suppose that all humans could simultaneously “choose” the same nature, Donnelly’s theory would still be problematic for universality. For if human nature is indeed created by social institutions, then who we are, or whether or not we lead fully human lives, depends not upon ourselves, but upon the effectiveness of our governments. Now, it may be desirable for government to help us achieve a life of dignity, but this should not mean that human dignity *depends* on government for its existence. Furthermore, if human nature is conventional, then it is necessarily conditioned by material circumstances -- thus, Donnelly notes that “If the moral vision remains constant, the list (of human rights) may evolve as material conditions change (or are perceived to change) or in response to omissions or unintended consequences that become apparent as a result of the operation of rights. The underlying moral vision may also evolve.”<sup>102</sup>

Based on this view, what is considered to be truly “human” may change radically from time to time. Thus, the only permanent good for humans is autonomy, or the ability to “choose” perpetually what our nature will be. Not only does such a view render pre-modern thinkers irrelevant, it also means that the only living arrangement suitable for a human being is liberal society. In this way, and also by equating human nature with human rights, Donnelly finds a way to dismiss non-liberal societies without ever really having to consider their philosophies. Autonomy has become the new standard by which cultures are measured.

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102. Donnelly, *Concept of Human Rights*, 35.

There is another problem with the assumption that the proper institutions are required for one to be fully human. If this is so, does Donnelly view those living in non-liberal society as not fully human? Or does he mean to say that such regimes treat people *as though* they were not fully human, and that is why they are wrong? If the latter, then Donnelly would have to admit that being human is a quality that transcends political institutions.

Donnelly admits that it will take a very special sort of liberalism for his concept of human rights to work. But it is a type of liberalism that simply cannot be supported by Donnelly's own theoretical foundations. He admits that the Western or liberal idea of human rights, which features "largely isolated individuals holding (only) property rights and 'negative' civil and political liberties, would, if accurate, mean that the liberal tradition is radically incompatible with the demands of internationally recognized human rights."<sup>103</sup> Instead, Donnelly advocates a "radical or social democratic" brand of liberalism that embraces economic and social rights as well as civil and political rights. But why *should* anyone go out of their way to ensure the economic rights of another person? Remember, Donnelly's theory of human rights assumes *nothing* about the existence of an objective truth or moral order. He does not presume that human beings have any specific purpose other than to be autonomous. It is not clear how this supposition can embrace obligation to others.

Classical natural right and natural law theories, however, do not have this problem, insofar as they stipulate that the universe is ordered, and that human beings

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103. Donnelly, *Universal Human Rights*, 88.



occupy a particular place within that order. They are informed by a teleological world view holds that all living things have a natural end that determines what sort of life is good for them, and that for human beings, this is determined through the use of reason.<sup>104</sup> In classical philosophy, the good life requires careful attention to the *telos*, or *end* of human being; this involves perfecting our nature, which in turn sanctions obligations to others.

Donnelly likes to say that even as autonomous individuals we have duties to the larger community, but in truth, his view stems from a philosophy that assumes community to be founded on self interest -- that is, upon the desire to escape what are, depending on one's view, the horrors or inconveniences of the state of nature. In contrast, classical philosophy assumes that man is by nature sociable and cannot reach his natural perfection in isolation. Therefore, "the perfection of his nature includes the social virtue par excellence, justice; justice and right are natural."<sup>105</sup>

Donnelly wants Lockean liberalism, with perhaps a greater emphasis on community spirit than Locke himself would have called for. But in stipulating human will as the source of human rights, it is difficult indeed to find the commonality required for social democratic liberalism, and impossible to achieve universality. For in spite of all his efforts to the contrary, the secular humanism he advocates cannot help but make the individual both the center of the universe and the measure of all things. Absent any idea of *telos* or objective standards transcending humanity, how do we know whether a human right is universal? If the only universal aspect of human nature is potential, if

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104. Strauss, *Natural Right and History*, 7.

105. *Ibid.*, 129.

human rights are simply a “particular moral vision,” then stipulating their universality is very difficult indeed. As Clifford Orwin and Thomas Pangle argue:

If man as a subject of rights is merely the product of ever-changing historical and cultural conditions, if he is nothing more than the malleable matter of an endless process of transformation, then there is nothing in him that can serve as the needed star for “human rights.” There can be no rational or permanent standard by which to guide our growing power for self-transformation and self-destruction and nothing in us that can claim exemption from social engineering and manipulation.<sup>106</sup>

On a final note, Donnelly’s argument is, interestingly enough, subject to the same criticisms he levels against natural law. He charges Thomas Aquinas, for example, with being soft on tyranny, since the philosopher did not believe in the natural right of the people to rebel. He says that “Natural law is only a standard of judgment, not a warrant to act. Natural law gives the people no *rights* to change their rulers.” Even if people do choose to rebel, “natural law is not the moral foundation for the action of the people against the tyrant; self government is consistent with, but not demanded by, the natural law and ‘natural right.’”<sup>107</sup>

What Donnelly neglects is that Aquinas insists that the ruler must always govern according to the common good, and that there are limits to our tolerance of the ruler: nobody is required, for instance, to obey a law in direct opposition to a divine commandment. But this aside, Donnelly’s concept is as conducive to tyranny as any other -- for if human rights are not grounded on any standard lying outside of human

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106. Orwin, Clifford and Thomas Pangle, “The Philosophical Foundation of Human Rights,” in *Human Rights in Our Time: Essays in Memory of Victor Baras*, ed. Mark F. Plattner (Boulder and London: Westview Press 1984), 2.

107. Donnelly, *Concept of Human Rights*, 48.

agency, they are necessarily defined by the powerful element of society, be it a tyrant or a tyranny of the majority. It can hardly be otherwise if truth is completely subject to human choice.<sup>108</sup>

Furthermore, Donnelly's theory is no more enforceable than he allows natural law to be. A common criticism of natural law aims at its prescriptive nature -- that is, in that it looks to how human beings *should* act as opposed to how they *do* act. Donnelly levels this charge indirectly when he supposes that knowing "what is right" is not nearly as powerful or effective as "having a right." Yet he never really proves that the latter is a more effective way to protect dignity:

An appeal to human rights is testimony to the absence of enforceable positive rights. . . One *claims* a right only when its enjoyment is threatened or denied . . . All rights claims are a sort of 'last resort': rights are actually claimed only when one doesn't 'have' the right (in the sense that it is not receiving direct or objective enjoyment) or fears that it cannot be enjoyed without assertive exercise . . . Thus the primary political functions of human rights, once we move from opposition to positive action, are likely to lie in the guidance they provide in founding a regime or revising its basic structure . . . In other words, human rights provide a standard of legitimacy for any government.<sup>109</sup>

Here Donnelly basically admits that the whole point of human rights is to get governments to think about what they *should* do, and this seems to be not much different from the function of natural law. But whereas natural law is based on transcendent standards, Donnelly's concept requires for its validity nothing more than

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108. As Michael Freeman argues, Donnelly's constructivist approach is "alarming" for just this reason: "Human rights are reduced from universal values to either arbitrary products of power or particular cultural developments . . . Donnelly tries to establish foundations for human rights upon the concept of human dignity, but he admits that the concept itself is subject to contingency and therefore is not readily defensible." See "The Philosophical Foundations of Human Rights," *Human Rights Quarterly* 16:3 (1994), 512.

109. Donnelly, *Concept of Human Rights*, 21-22.

majority agreement. As a result, the realization of universal human rights is impossible without universal democracy. In addition, the concept threatens to trample the very values of individuality and autonomy that liberals so cherish, for as Michael Freeman argues, Donnelly's theory implies that "The moral beliefs of majorities are binding on dissenting minorities." Indeed:

This is inconsistent with the view usually held by human rights theorists, and accepted by Donnelly, that individuals and minorities are not necessarily obliged to conform to the values of majorities. If Donnelly were to argue that this consensus is binding because it is a consensus for human rights, he would have to provide a reason for allowing it to override the logic of cultural relativism.<sup>110</sup>

In the end, then, we see in Donnelly's work what is arguably one of the most comprehensive attempts to construct a theory of universality on secular humanist grounds. We also see that such a theory has trouble not only in proving its superiority to competing ideas, but also in supporting its own tenets. The whole idea of universal human rights seems to imply that particular "goods" are required for leading a specifically *human* life. The question remains: is it possible to determine what the good life requires without appealing to objective moral principles?

### *Autonomy and Community*

In her book *Human Rights and the Search for Community*, Rhoda E. Howard continues the attempt to explicate a coherent theory of universality apart from objective norms. As we shall see, she ultimately proves no more successful than Donnelly.

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110. Freeman, "The Philosophical Foundations of Human Rights," 492.

Howard shares Donnelly's "constructivist" vision of human nature, agreeing that human nature essentially "creates itself." She explains that it is a "socially variable phenomenon," composed of both survival needs and the choices people make. As such, human rights are derived from neither God nor nature, but rather, "are nothing more than what human beings proclaim they ought to be. They are universal in the sense that they ought to be universal regardless of whether the great religions universally accept them as principles."<sup>111</sup>

Howard is more explicit than Donnelly in insisting that human rights should not be confused with any religiously inspired vision of human good -- they are simply "a modern secular version of our social need to have overriding, inviolable principles of morality." Although this morality may at times coincide with religious values, essentially, it is "grounded in what human beings think is moral. As societies change, people's moral norms and values also change."<sup>112</sup> In other words, morality is simply a matter of personal preference. Certainly, the cultural relativists would agree with this statement. The glaring question, however, is whether the *universalists* ought to as well.

Howard's rejection of a religious basis for human rights is also an implicit rejection of natural standards. She is correct in asserting that human rights are not derived from "divine decree," for myriad world religions display a wide variety of precepts. Yet she fails to acknowledge that for all their variety, most religions do possess a common core of shared norms which suggests the existence of a transcendent,

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111. Howard, Rhoda E., *Human Rights and the Search for Community* (Boulder: Westview Press, 1995), 12-15.

112. *Ibid.*, 15-16.

cross-cultural truth. In fact, the foundation Howard lays for human rights is just as inimical to universality as the one offered by Donnelly, for when autonomy is the measure of legitimacy, there is no way to argue that human rights can, or should, apply to everyone.

Howard is no better than Donnelly at providing a concrete definition of dignity, although she does make a more thoroughgoing attempt to link dignity with the idea of rights. She describes dignity as a condition wherein we enjoy “personal autonomy, societal concern and respect, and treatment by others in society as an equal.” Like Donnelly, she considers autonomy to be the cardinal human virtue, but she adds that this should entail not just independence, but also that “all citizens ought to be concerned with the dignity of all fellow citizens.” She thus moves beyond the claim that the *state* should treat citizens with equal concern and respect to the idea that *citizens themselves* should extend the same treatment to each other. But she supposes that this is not possible unless all citizens enjoy minimum economic rights and equality, for in today’s capitalist world, “influenced as it is by the social ideology of human equality, not to be considered of equal moral value to all other human beings is to be profoundly hurt and degraded.”<sup>113</sup> The implication of this is that people can only be true “moral equals” if they are also economic equals.

Before we discuss the merits of this argument, let us consider Howard’s definition of dignity in more detail. Like Donnelly, she believes that dignity consists in being autonomous. This is not the case in other cultures, Howard contends, where

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113. Ibid., 17-18.

“dignity” is a concept attached only to those who belong to the community and adhere to society’s “values, customs and norms.”<sup>114</sup> She explains:

In many lexicons of dignity and justice, to be human is a social attribute. The human being is the person who has learned and obeys the community’s rules. A nonsocial, atomized individual is not human: He is a species of “Other,” perhaps equivalent to a (presocialized) child, a stranger, a slave, or even an animal.<sup>115</sup>

Because of this, Howard argues that the human rights approach is really the only method of securing *universal* dignity; for in a society based on human rights, “human dignity consists not of acquiescence to hierarchical order but of equality and assertion of one’s claim to respect.”<sup>116</sup> Howard seems to want to claim that in her approach, dignity is about what we *are* -- in other words, about the qualities we possess that make us human (like autonomy); whereas in other cultures, dignity is about what we *do* -- specifically, whether or not we abide by the rules of the group. But as we shall see, in the final analysis, Howard’s concept of dignity is very much like Donnelly’s -- dependent upon the existence of the right social structures. Let us see how this happens.

Despite its emphasis on personal autonomy, Howard claims that her concept of dignity does not encourage “anomic individualism,” but actually promotes the integration of the individual into society. It accomplishes this by linking autonomy with “ethical individualism,” an admittedly idealistic approach, that “expects the ethical individual to act on his obligation to the community,” which derives from a “freely

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114. Ibid., 82.

115. Ibid., 84-85.

116. Ibid., 27.

maintained network of multifarious connections to others,” including “family of origin” and relations resulting from “changing life circumstances or active choice.”<sup>117</sup>

By upholding the ethical individual as the personification of human dignity and the goal of human rights, Howard hopes to combine the notions of individuality and community into a harmonious whole, since “only such a reintegration can answer the communitarian charge that human rights are symptomatic of overly individualist and materialistic societies.” In this way, we can ensure that “all individuals must be treated as if they are of equal moral worth.”<sup>118</sup>

A political regime protective of human rights, then, demands first of all the elimination of social degradation and implied insider-outsider social statuses. But such formal civil equality is not enough. A community of trust is also required to ensure not only the substantive protection of civil and political rights, but also the substantive protection of economic rights. The state in and of itself cannot protect the latter. A minimal standard of economic well-being is only possible in a community of obligation.<sup>119</sup>

Howard, like Donnelly, stipulates that liberalism has not failed in establishing universal human rights, but rather, that it is incomplete -- it cannot fulfill its mission without equal attention to economic rights. She advocates “social democracy” -- “a variant of liberalism that views the social provision of economic security as an inherent part of respect for the individual” -- as opposed to ordinary democracy, which is “an ethos and way of life characterized by a general leveling of status differences.” Basically, “social democracy provides a welfare net that ensures all the basic needs of

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117. Ibid., 196.

118. Ibid., 202.

119. Ibid., 203.



citizens will be met. Economic rights are a matter of entitlement, not a matter of desert.”<sup>120</sup>

Social democracy ensures dignity by keeping the poor from being alienated from society, for “poverty undermines community. The capacity to lead an intrinsically satisfying life enmeshed in a variety of social relations depends to a considerable extent on one’s educational level and income.” Furthermore, Howard supposes, the wealthier one is, the likelier one will “engage in voluntary activities dedicated to helping others.”<sup>121</sup> It appears, then, that the good life depends more on material comfort than on the proper ordering of one’s soul.

This is where Howard’s argument becomes circular. Let us start at the beginning: In her view, human rights represent the best way to institutionalize human dignity. Human dignity is defined as the condition in which we are autonomous, are respected, and respect others; in short, it is the condition in which we act as ethical individuals. The ethical individual is in this sense the “end” at which human rights aim. But how do we get people to act as ethical individuals? This is possible, Howard contends, only in a “social democracy” that guarantees economic rights, because when we are economically equal we can act more freely and be more community oriented. But she acknowledges that state mechanisms alone are not enough to make economic rights a reality -- this also requires a “community of trust” -- that is, some quality in the citizenry that government cannot provide. So in the end, the ethical individual cannot

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120. Ibid., 199.

121. Ibid., 197.

exist without the right social structure -- social democracy; yet social democracy cannot come into being without the ethical individual.

Once again we are presented with a vision of human nature in which dignity depends on *institutions* rather than on individual virtue. Howard is correct in supposing that help for the needy comes not strictly from government, but from a community spirit in which charity flourishes. Yet by the logic of her own theory, there is no reason to suppose that individuals will, or should, possess such a spirit. This is the problem with wanting people to be more morally accountable than liberalism requires. For if human beings “create” their own nature; if value derives from *choice* as opposed to *truth*; then it is very difficult to explain why people should be motivated toward community. Like natural law, Howard’s theory appeals to our sense of civic obligation by arguing that we *should* care about the common good, because it is “right” to do so. But unlike natural law, Howard’s theory can offer no good reason *why* an autonomous individual should be ethical. For natural law holds that the chief benefit of community spirit goes not to the community, but to the civic minded individual. Howard may be correct in supposing that the greater community will benefit when the wealthiest are willing to act charitably toward those in need. But the question remains: What will motivate them to do so, when nothing is higher than human choice, and one choice is therefore necessarily as good as the next?

Having closed the circle of her secular humanist argument, Howard then caricatures opposing views, thus conveniently avoiding the need to address the more

serious challenges to her view. For example, in praising the attention that international agreements draw to human rights issues, she claims:

It renders it difficult, if not impossible, for Muslim, Hindu, Christian, or Jewish traditionalists to say what they really believe: that they are against human rights; that they disagree with the ideals of equality, autonomy, and respect for all; and that they prefer societies in which certain categories of people are considered unequal and undeserving of respect, in which the assertion of human rights would be punished.<sup>122</sup>

Howard similarly exaggerates all arguments opposing the liberal idea of human rights. For example, the only critics she acknowledges are advocates of traditionalism (who suppose traditional rules, regardless of content, are more important than individual rights), to whom she refers in the above quotation, and “reactionary conservatives,” who reject excessive individualism and freedom, but do not advocate standards of economic security. Howard depicts this latter group as mindless “family values” fanatics who wish to return to the 1950's, and equates their intolerance of fringe groups with Naziism.<sup>123</sup> She also implies that this kind of traditionalism is the only feasible ground for opposition to abortion and betrays a complete lack of understanding of her philosophical rivals when she supposes that conflict over the issue would dissolve if conservatives would only realize that women who have abortions may already have children, or plan to have them, and thus are not really anti-family.<sup>124</sup> By portraying her opponents as vacuous cheerleaders for “family values,” a catch phrase that provokes Pavlovian ridicule these days, Howard avoids confronting the more serious criticism of the liberal view offered by natural law. That critique, as will become more clear over

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122. Ibid., 98.

123. Ibid., 184-87.

124. Ibid., 184-85.

the course of this work, proscribes certain acts not only for the harm they bring to the community, but also for the damage they inflict on the agents who perform them.

In the end, it seems, many modern philosophers want to have their cake and eat it too. They cling desperately to liberalism's promise of individual autonomy, all the while sensing that the notion of universal human rights requires a degree of community obligation liberalism simply does not provide. But instead of taking this as a call to return from unsubstantiated idealism to the more difficult idea of objective moral principles, liberal theorists continue to search for an elusive panacea in the haystack of secular humanism.

*Liberalism and Relativism: Not-so-Strange Bedfellows*

Robert D. Sloane argues for the liberal conception of human rights in a new way. Like Donnelly and Howard, he views autonomy as the lodestar of universal human rights. But he also realizes, as noted above, that the premises of the liberal view and cultural relativism are essentially the same. Sloane supposes that since both sides invoke autonomy as a justification for their arguments, this somehow vindicates the dignity-as-autonomy principle as the proper foundation for universal human rights.<sup>125</sup>

Sloane does not deny the claims of "narrative relativism," which "calls attention to the failure of universal human rights to acknowledge the critical reliance of cultures

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125. Sloane, Robert D., "Outrelavizing Relativism: A Liberal Defense of the Universality of International Human Rights," *Vanderbilt Journal of Transnational Law*, 34 (May 2001), 527; available from [http://web3.infotrac.galegroup.com/itw/infomark/148/577/63851537w3/purl==rcl\\_EAIM\\_0...](http://web3.infotrac.galegroup.com/itw/infomark/148/577/63851537w3/purl==rcl_EAIM_0...); Internet; accessed August 30, 2003, p. 1 of 37.

on implicit narratives that inform their normative framework.”<sup>126</sup> But he says of the arguments for cultural relativism:

(They) establish, at best, that we lack non-contingent criteria – which refers to standards independent of specific historical, cultural, and linguistic contexts – to evaluate competing value hierarchies. But the absence of neutral, non-contingent criteria does not repudiate the normative universality of human rights; it demonstrates, more modestly, that “universal” must not be understood in a transcendental or ontological sense – as a scientific claim about the “true” nature of the world and its inhabitants . . . To claim that universal connotes “objectively true” is to deny that reasonable individuals can hold disparate, but equally valid, opinions about ultimate questions of value. But the possibility, indeed, even desirability of these different opinions – about politics, ethics, the nature of the “good life,” and so forth – is inextricably intertwined with the very protections that universal human rights law strives to extend to all individuals. . . <sup>127</sup>

Basically, then, the only universal truth is that truth is relative and therefore, the fundamental right is one to autonomy, by which each person determines his or her own truth. Sloane’s argument is of course logically the same as that of relativism – “cultural relativism in fact invokes – and absent some presently unarticulated alternative, must invoke – the liberal values of reasonable tolerance and autonomy in any attempt to repudiate international human rights law.”<sup>128</sup> Sloane supposes that since cultural relativism and the liberal view of universality are both grounded in the principle of autonomy, this proves that the view which explicitly acknowledges this (liberalism) is correct. But of course, another possibility, overlooked by Sloane, is that *both* views are therefore wrong. An honest liar, after all, is still a liar.

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126. Ibid., 3 of 37.

127. Ibid., 3 of 37.

128. Ibid., 3 of 37.

By liberalism, Sloane is referring to “the primacy of the individual as the fundamental unit of concern and measure of value, a conception of rights as political “trumps” against the demands of the state or community; a commitment to some measure of democratic participation in government; a concern with preserving autonomy; and finally, some notion of equality.”<sup>129</sup> Now, these are certainly admirable goals. The problem is that by making the individual the *source* of these goods, liberalism can ultimately lead to a philosophy which undermines the person.

Sloane claims that natural law is an insufficient basis for human rights because it “includes no necessary connection to the human subject,” and says that natural law is more concerned with God, or the order of the cosmos, than with individual human beings.<sup>130</sup> He prefers a natural rights approach, since it effects “a crucial shift in the locus of universality: from ‘nature’ or ‘divinity’ to ‘human.’” He continues that “from the standpoint of the history of philosophy, then, the universality of human rights resides in either transcendental features of the natural world, or alternatively, in some essential, peculiar features of human beings, qua human.”<sup>131</sup> This is really an oversimplification of the ideas of natural law and natural rights, however, and establishes a false dichotomy between the two – in its assumption that universality resides in either the transcendental nature of the natural world or in the inner features of humans. In fact, natural law is concerned with both the individual and his/her relation to the larger whole. Sloane speaks as though natural law has nothing to say about

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129. Ibid., 4 of 37.

130. Ibid., 5 of 37.

131. Ibid., 5 of 37.

individual humans when in fact its primary focus is about the human person – not as the measure of all things, but as being located within a larger order. Sloane further dismisses natural law as a basis for human rights:

All major religious traditions – Christianity, Islam, Judaism, Hinduism, and Buddhism – manifest concepts analogous to Aquinas’ conception of divine law. They all, that is, assert certain moral precepts as a universal code written into the “true” nature of reality . . . Transcendentalist approaches render claims of universal human rights coherent because they make strong claims about the ultimate ontological status of the world and its inhabitants. But absent genuine consensus on these issues – needless to say, this is lacking – the fact of cultural pluralism compels the conclusion that these schemes will necessarily conflict . . . By asserting a transcendental universality for human rights, then, natural law and other ontologically-based theories undermine a central value of human rights itself – the tolerance of reasonable pluralism.<sup>132</sup>

In saying that natural law undermines “reasonable pluralism,” Sloane advances the fallacious argument that the absence of agreement is equivalent to the absence of truth. In fact, natural law would welcome a “reasonable” pluralism – that is, a philosophy in which the use of reason is employed to discern the dictates of natural law in particular situations. For Sloane, however, the only “truth” is that we must agree to disagree, and the only way to “universalize” such a notion is to make “tolerance” of different expressions of personal autonomy the overriding principle of judgment:

The rationale for this principle of tolerance . . . stems from the . . . assumption that no one set of values – no single “conception of the good” – is right for everyone. This claim could . . . mean that, as a matter of metaethics, personal, cultural and societal differences render certain values worthier of pursuit for some people than for others; or it could mean that, empirically, even if one set of values is in fact right for everyone we cannot know this . . . in either case the rationale for valuing

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132. Ibid., 11 of 37.

autonomy reduces to the same basic claim – that choice is the prerequisite for individuals to give meaning to their lives.<sup>133</sup> (20)

With this, Sloane believes he has defeated relativism. He has admitted that a liberal conception of human rights values the principle of autonomy above all; he has shown that defending cultural relativism also requires invoking the principle of autonomy; from this, he draws the conclusion that the liberal conception of human rights is correct. Again, the conclusion Sloane doesn't consider is that both views may be wrong.

It is not at all clear why agreement between liberals and relativists should vindicate the liberal view rather than simply revealing that the two camps are more alike than they are different. Indeed, Sloane rightly points out that “We live in a world, not of competing relativisms – ‘these values embody the good for a circumscribed set of persons leading lives in this particular cultural context’ – but of competing universalisms – “these values embody the good.”<sup>134</sup> This seems to be a more honest assessment of the way human beings think and act. Unfortunately, Sloane believes that this notion paradoxically undermines respect for universal human rights:

Most non-rights-based conceptions of human dignity insist upon a singular substantive conception of the good; they therefore demand adherence to specific values, ideologies, and attendant behaviors. (In contrast), the human rights tradition . . . far from denying pluralism and far from denying diverse conceptions of cultural value, is animated by

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133. Ibid., 20 of 37.

134. Ibid., 21 of 37. See also Ken Booth, “Three Tyrannies,” *Human Rights in Global Politics*, p. 56: “Cultural relativists and postmodernists will argue against universal ideas – ‘metanarratives’ – while valuing tolerance as a universal. Clearly, there are no non-universals. Even the total rejection of universal human rights is a universalist position on human rights.” See also in the same book “Universal Human Rights: a Critique,” in which Chris Brown argues that even if liberalism is true, by nature it lacks the requisite moral authority that true universality requires.



the distinctively liberal presumption of reasonable value pluralism . . .  
“What distinguishes liberal tolerance is precisely its commitment to  
autonomy – that is, the idea that individuals should be free to assess and  
potentially revise their existing ends.”<sup>135</sup>

It bears repeating that the framers of the Universal Declaration of Human Rights believed in a universal human nature. By defining human nature as essentially autonomous and self-creating, Donnelly, Howard and Sloane have eradicated the very foundation of universality. The real danger to universal human rights, it turns out, comes not from those arguing for respect for cultural differences, or even from regimes who abuse human rights in the name of cultural relativism (for their hypocrisy is evident enough to preclude their being taken seriously) but rather from those who would elevate the principle of autonomy from a value to be pursued to the source of value itself.

### *Sentiment as Foundation*

Donnelly, Howard and Sloane present human rights as springing from man’s universal nature as an autonomous being. We have established that because these arguments refuse to acknowledge a universal standard apart from human will, they inevitably collapse into the realist contention that power is the only force governing international relations, and that human rights will therefore be defined by the strong.

According to Richard Rorty, the problem with most theories (and particularly those centered on autonomy) lies not in their neglect of objective standards, but in the fact that they are based in the *rational*, as opposed to the *emotional* nature of human

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135. Sloane, “Outrelativizing Relativism,” 21 of 37.

beings. Rorty explains that although rationality is traditionally thought to be the universally shared moral attribute that grounds morality, this is in fact irrelevant to the idea of universal human rights:

The emergence of the human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories . . . Since no useful work seems to be done by insisting on a purportedly ahistorical human nature, there probably is no such nature, or at least nothing in that nature that is relevant to our moral choices.<sup>136</sup>

Rorty sees rationality as a subjective term which obstructs, rather than advances, our understanding of human rights -- for more often than not, it is employed by human rights violators who regard their victims as sub-human or as children who are not fully rational. In other words, "human" tends to be viewed as synonymous with "rational."

And the "rational" is simply whatever a particular community defines it to be.<sup>137</sup>

Therefore, Rorty argues, the success of the human rights movement depends not on convincing violators that their actions are "irrational" -- for this will always be a losing battle -- but rather, on stoking world outrage over their crimes, because *sentiment* is a universal attribute more commonly agreed upon than rationality. The chief difference between humans and animals, Rorty contends, is not that we think whereas they merely feel, but that "we can feel *for each other* to a much greater extent than they can."

Therefore:

Let us concentrate our energies on manipulating sentiments, on sentimental education. That sort of education sufficiently acquaints

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136. Rorty, Richard, "Human Rights, Rationality, and Sentimentality," *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. Stephen Shute and Susan Hurley, (New York: Basic Books, 1993), 119.

137. *Ibid.*, 124.

people of different kinds with one another so that they are less tempted to think of those different from themselves as only quasi-human.<sup>138</sup>

The solution to the human rights problem, then, is simply a matter of instilling the proper emotions in people. The difficulty in this, however, is that without stipulating a fixed human nature and an objective moral order, it is hard to know what the appropriate emotional response should be in a given situation. But Rorty is emphatically *against* dealing with this issue. He argues that thinkers today are less interested in asking “What is our nature?” than in asking “What can we make of ourselves?” As a result, he says “we are much less inclined than our ancestors to take ‘theories of human nature’ seriously,” but are “coming to think of ourselves as the flexible, protean, self-shaping animal rather than as the rational animal or the cruel animal.”<sup>139</sup> Like Donnelly, Rorty argues that what is important about human nature is not its end, but rather, its potential. Hope replaces knowledge, offering the possibility that “if we can work together, we can make ourselves into whatever we are clever and courageous enough to imagine ourselves becoming.”<sup>140</sup>

But in using plasticity as the criterion for human good, Rorty falls into the same trap as Donnelly; for his theory culminates in the view that what is really important is “progress,” and therefore, newer is always better. As a result, Rorty, having argued well about the importance of sentiment, often jumps to conclusions that are at odds with some of his premises. For example, he initially makes some good points about the

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138. Ibid., 122-23.

139. Ibid., 115.

140. Ibid., 121-122.

dangers of excluding certain groups from the definition of “humanity,” the plight of blacks and women being a case in point. He then goes on to say that since it is widely believed today that prejudice “against racial or religious groups” is wrong, it is now easy to convert students to “standard liberal views about abortion, gay rights, and the like. You may even get them to stop eating animals . . . You do this by manipulating their sentiments in such a way that they imagine themselves in the shoes of the despised and oppressed.”<sup>141</sup>

Such manipulation, Rorty contends, will produce generations of “nice, tolerant” people, which in the end is all the human rights movement needs to flourish. Because Rorty views humans as “flexible, protean and self shaping” as opposed to limited by a universal nature, he supposes, to the detriment of his argument, that modern liberal views are necessarily correct. So even though he has argued forcefully against the practice of deciding who shall count as “human,” he does not seem to notice that the permissibility of abortion depends largely upon our willingness to exclude a certain class of *homo sapiens* from the definition of humanity.

Furthermore, Rorty seems to be traveling down the road paved by the so-called bioethicist Peter Singer in leaving open the possibility of granting animal rights equal protection with human rights. For if rationality is irrelevant, if the only criterion for validity is sentimentality, then who is to say that some animals do not possess as much capacity as human beings for pity? Certainly, they do not kill arbitrarily as humans seem to do. Is Rorty prepared to add a universal declaration of animal rights to be

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141. Ibid., 126-27.

defended by international law? We need more than emotions to effectively combat evils like prejudice; we require rationality -- that is, the knowledge that things like slavery or genocide are wrong *objectively*, and not simply because they make us angry or queasy. For as Aristotle points out, it is easy to be angry. But to be angry in the proper way, at the proper time and for the proper reason is no easy task. This is why our emotions, while not to be dismissed, must nevertheless be under the direction of reason.

Certainly, Rorty's plan could increase tolerance. But this does not necessarily lead to the idea of universal rights. We could all, after all, put ourselves in the shoes of another and perhaps understand *what* makes the murderer commit the crime. But does empathizing with someone's troubled childhood or impoverishment, for example, eradicate the evil of the deed? If so, then the acceptability of an act amounts to whether or not it can evoke a favorable emotional response, a sad truth that seems to play out continually in U.S. courtrooms. This shows the danger of appealing strictly to sentiment -- the popular sentiments of the day are not always correct. Furthermore, Rorty's theory, even more than the others, paves a short road to tyranny. For if truth resides in *feeling*, then human rights will be defined by whoever is most adept at manipulation. Invariably, this is the person with the most access to the media, or with the glibbest tongue. Without reference to an objective idea of human good, how shall we hold government leaders accountable for offensive actions?

Rorty's theory is also incompatible with universality because although the capacity for sentiment may be universal, how this is manifest across cultures is not.<sup>142</sup> Since what is important for Rorty is the manipulation of sentiment, it is difficult to see how he can argue that one culture's "feelings" about a particular human right are inferior or superior to another's, as long as the feelings are just as intense.

Rorty makes the important point that human beings are distinguished just as much by their capacity for friendship and sentimentality as they are by their capacity for knowledge. But in downplaying the latter to the point of irrelevancy, he obliterates the possibility of judging whether our emotional responses are correct. He argues against the idea of an ahistorical human nature, but has offered nothing other than a different theory of human nature -- one positing that humans are feeling beings, as opposed to thinking and feeling beings. But as we have seen, stressing sentimentality over reason does not necessarily cultivate a greater appreciation of human rights, nor does it, in its Machiavellian overtones, break out of the realist world view in which the ability to wield power, whether as brute force or manipulation, always trumps all questions of right and wrong.

### *Evolution and Human Rights*

So far, we have seen how all attempts to define universality without the idea of objective truth fall flat. Human nature, actions or sentiments, untethered from the idea of an ordered universe, offer no real guide for understanding or ensuring universal

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142. For more on this, see Frances V. Harbour, "Basic Moral Values: A Shared Core," *Ethics and International Affairs* 9 (1995), 155-170.

human rights. John O'Manique seems to understand the importance of an objective standard to the idea of universality, but does not want to acknowledge the need for natural law. So he argues that human life is not beholden to an independent measure of truth, but rather, creates its own truth through evolution. What is interesting is that the more O'Manique tries to deny the importance of teleology to the idea of universality, the more he unwittingly proves the necessary connection between the two.

O'Manique points out that as acceptance of rationalist and theist foundations for human rights has waned, so too has the case for universality; Western explanations have become "a confusing mixture of the inalienable and universal rights of the natural law tradition, Western declarations, and the state-created privileges of the positivist." Even though human rights declarations cite dignity as a source, "neither the concept of human dignity nor its connection with rights . . . are objective or fundamental. Dignity as recognized and granted by others is subjective and variable."<sup>143</sup>

O'Manique's argument implies that neither empirical nor prescriptive explanations of human rights sufficiently support the idea of universality:

If rights are identified with the exercise of rights, then they come and go; they are augmented or reduced according to the decisions of powerful agents in society. If rights were ultimately no more than this, law would be the foundation of human rights. If rights are identified with the recognition and acceptance of rights, then their foundations will be deeper than law; they will be grounded in social value systems, or, perhaps, written or unwritten constitutions. They would not, however, be universal and inalienable and the questions, "What is it that is

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143. O'Manique, John, "Universal and Inalienable Rights: A Search for Foundations," *Human Rights Quarterly* 12 (November, 1990), 467.

recognized?” or “What is the basis for the value system?” would be unanswered.<sup>144</sup>

So rights are more than what is practiced, or they would simply be propaganda for the strong. Rights must be more than what is accepted, or they could not be used to influence societies who do not respect them. So we must think of a new way to describe rights. Now, O’Manique realizes that when rights are defined as purely human creations, universality is threatened. Indeed, he recognizes the need for an objective source of human rights, but rather than offering any type of natural law explanation, he proposes the need for “new foundations that would not themselves be human creations, would provide some reasonable and objective bases for the claim that rights are universal and inalienable, and would be sufficiently devoid of ethnic content so as to be globally acceptable and applicable.”<sup>145</sup> In other words, in order for human rights to be truly universal, and not just one culture’s attempt to force its values on another, they must be objective and have a scientific basis. O’Manique believes that the concept of evolution provides the best foundation for meeting these needs.

Evolution, of course, pertains to the way a species develops and survives. What universal rights, then, would the principle of evolution entail? To begin with, O’Manique notes that *any* claim to a universal right must be one that every human being could make, and could expect others to accept. To be inalienable, the “claim and its justification must arise from within the claimant and not from some other agents.” Something needed for survival would fit this bill. O’Manique concedes that this does

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144. Ibid., 469.

145. Ibid., 471.



involve a moral principle -- namely, that survival is good. But he says that this does not compromise the objectivity of his theory, since this belief is “virtually universal.” For human beings, however, survival means more than just existing; indeed, human evolution has also produced a self-consciousness:

We create goals, design paths to them and attempt to achieve them by effecting some self-conscious control over our tendencies as well as over our environment . . . We have biological roots but also transcend them, meaning that we can neither ignore genetic factors nor reduce our behavior to them . . . Human aspirations are not to the mere maintenance of existence but to the fulfillment of life and, I think, even the universal propensity we have been discussing is better related to the broader concept of development than to survival alone. If we believe that one ought to survive, it is because we believe that one ought to develop.<sup>146</sup>

O'Manique adamantly insists that it is not teleology, but evolution that drives human beings toward the self understanding that enables them to develop morally. Moral development, it would seem, is as necessary as life itself to human being. All humans need to associate with others, to express themselves, to enjoy a degree of autonomy, and to have access to “love and beauty.” O'Manique contends that these human needs are the foundation of universal rights since they “can be observed and even empirically confirmed within the social sciences and psychology.”<sup>147</sup> He does admit that in attempting to answer the question of what is good for human beings, his concept is “essentially normative.” But he insists that in being founded on a “fundamental principle of the evolutionary process,” namely, that development

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146. Ibid., 474-475.

147. Ibid., 476.

enhances survival, it is “based on a foundation that, unlike moral systems or attitudes, is not itself a human creation.”<sup>148</sup>

O’Manique acknowledges that “if a right is to be universal and inalienable, then it must be based on something other than human authority or even human attitudes or value systems which, as human creations, vary over space and time.” Yet his argument for evolution as an objective measure of human rights turns out to be an exercise in wishful thinking, for he admits that the notion that one may have a right to a particular thing that promotes development still cannot be “confirmed or denied empirically.” Everything still turns on the question of what is the best life for a human being, a question that is best answered through a teleological response.

Consider the following: Teleology posits that all things have an end, or a function, and that this determines what kind of life is good for them. In the view of Aristotle and Aquinas, for example, the universe is ordered by an unmoved mover; all things, to varying degrees, tend toward an imitation of this form. As we move up the chain of being, we find man has something that no other thing, animate or inanimate, possesses -- *logos*, or reasoned speech. Therefore, it is the function of man to use his *logos* to attain the unmoved mover. In other words, human beings, like all living species, must survive; but unlike other species, they must also strive to attain truth -- that is, to reach for something *beyond* their own survival. Truth, in the end, is more important for man than survival alone, because it is a good more proper to his nature. This is why the moral dimension is so necessary to human life. The evolutionary view,

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148. Ibid., 476.

put in teleological terms, supposes that all living things have a single function -- survival. So if human beings require a moral life, ultimately this must be because it is necessary for the survival of the species.

Both the teleological and the evolutionary views of human nature posit that certain things are good for human beings, in all times and circumstances. But the evolutionary theory actually fails to answer the question of *why* human beings should be moral. For if evolution holds that morality enhances human survival, how can it explain why morality sometimes requires actions that seem detrimental to one's own survival -- such as observing rules of warfare at the risk of one's own life or the lives of one's troops? Why should humans be moral if they can survive just as well without morality? In the evolutionary view, there is no real incentive for *individuals* to act morally, for the only purpose higher than individual human existence is survival of the species.

What this amounts to is not an objective principle, as O'Manique hopes, but the idea that mankind itself is the highest good. Truth must be whatever enables the species to survive. So how do we use this to criticize the human rights practices of other regimes? Without a transcendent standard, how do we know that their actions will not, in the end, produce a better species of human being than our own actions will? Furthermore, if evolution shows that human beings need reflection, love and beauty to survive, then why are evil characters not selected out of the species, instead of continually cropping up throughout time? Why was the twentieth century among the bloodiest epochs in history?

Overall, it is difficult to see how the idea of human flourishing can fit into a strictly evolutionary thesis, since the term as O'Manique uses it implies an entire normative dimension which begs the question of *how* human beings should best develop. The answer to this question is largely prescriptive -- it cannot be proven empirically. O'Manique seems to be saying that human beings seek certain goals because they *should*; in other words, because certain things are *good* for human beings. Now, from a strictly evolutionary standpoint, organisms either develop or they die. But it is perfectly possible for a human being to "survive" in the ordinary sense of the word and not "develop" as a human being. We can choose whether or not to pursue the good life.

Finally, O'Manique's theory, like those discussed heretofore, seems to require that we consider ourselves to be morally superior to preceding generations. This is hardly self-evident and is contrary to the idea of universality, for it implies that what is good for one generation is not necessarily good for the next. But universality of human rights requires, above all, the idea that human nature is unchanging and that certain goods are perennial. So how can we speak about universal human rights in a way that is logically consistent?

### **Human Rights as Moral Principles**

Michael Perry contends that the only way to argue logically for human rights is to begin from the standpoint that all human beings are sacred:

The idea of human rights that informs these various international human rights documents (and many others) is, then, in part, the idea that *there is something about each and every human being, simply as a human being,*

*such that certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.*<sup>149</sup>

This view, argues Perry, stems from the “religious” response to the “problem of meaning”-- “the trust that the world is finally meaningful, meaningful in a way hospitable to our deepest yearnings”-- “a vision of final and radical reconciliation, a set of beliefs about how one is or can be bound or connected to the world – to the ‘other’ and to ‘nature’ – and, above all, to Ultimate Reality in a profoundly intimate way.”<sup>150</sup> He contrasts this with a “non-religious” view, which holds that man is “an alien, an exile, homeless, in a world, a universe, that is strange, hostile, pointless, absurd.”<sup>151</sup> According to Perry, there is no reason to suppose one is connected to the “other” and therefore should respect human rights unless one holds the view that ultimately, the other is one’s brother/sister. To ask “why should I be moral?” says Perry, is to say “Why should I care about a stranger?”<sup>152</sup> Perry explains that to uphold the idea of universal rights is to uphold a view that is essentially religious, even if a person does not acknowledge it as such:

(This) is *not* to deny that one can take human rights very seriously indeed without being religious, that agnostics, too, even atheists, can take human rights seriously, that they, too can love the Other . . . Indeed, if the Other really is, in some deep sense, one’s sister/brother, then it would be surprising if every nonreligious person were existentially

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149. Perry, Michael, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998), 13. The italics are Perry’s.

150. Ibid., 14-15.

151. Ibid., 14.

152. Ibid., 30.

disconnected from that truth. . . But . . . to be connected to that truth existentially, . . . is not necessarily to affirm it intellectually.<sup>153</sup>

When human rights are violated, the fundamental wrong lies much deeper than in an affront to world sentiments. “It is that somehow, the very order of the world – the *normative* order of the world - is transgressed.”<sup>154</sup>

The “natural law” that the idea of human rights presupposes is simply that all (or virtually all) human beings share some significant characteristics, in that sense they share a “nature” in virtue of which some things are good for every human being – some things are valuable for (and, so, should be valued by) every human being – and some things are bad for every human being – some things are harmful to (and, so, should be disvalued by) every human being.<sup>155</sup>

The idea that there is an ultimate universal good for everyone is not, however, contrary to the idea that there can be a plurality of particular goods for different cultures, depending on different situations.<sup>156</sup>

While Perry’s argument about constructing a logical argument for universal human rights may be true, his decision to refer to moral questions as being “religious” plays into the hands of the modern cultural ethos which presumes that bringing moral issues to the public square is the equivalent of the state establishment of religion. But this of course is not the case.

Perry’s analysis points to a larger point that is most relevant to the case for universality: To speak intelligibly about human rights, we must recognize that we are dealing with moral principles, and identify human rights as such. This requires setting

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153. Ibid., 35.

154. Ibid., 38.

155. Ibid., 68.

156. Ibid., 69.

aside the notion that moral principles should not be discussed in the public square, and acknowledging the connection between law and morality. Much has been made of the question of whether law may enforce “morality.” But we should bear in mind that law is itself a moral principle. The work of Hadley Arkes is most instructive here. He notes, “The law enters for the sake of enforcing a rule of right and wrong whose validity no longer depends entirely on the self-interest of the parties. But to speak of rules of that kind is to recognize . . . the logic of ‘morals’ And if morals exist, then people may be committed on many other matters that run counter to their self-interest, even when they have not personally ‘contracted’ for those commitments.”<sup>157</sup> To have laws against slavery or child abuse, as we do, indicates that we believe there is a rule involved in these cases “that does not depend for its validity on the self-interest or the preferences of the participants.”<sup>158</sup> The logic of law, as well as the logic of morals, is that the first principles upon which it is based are true regardless of whether or not a particular individual consents to them.

The tendency in law and politics these days, however, is to suppose that moral discourse belongs entirely within the realm of private religious belief or personal opinion. Even though we admit that morals deal with the most important questions regarding the conduct of our lives, it is presumed that “the exercise of moral judgment

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157. Arkes, Hadley, *First Things: An Inquiry into the First Principles of Morals and Justice* (Princeton: Princeton University Press, 1986), 16-17.

158. *Ibid.*, 18.

is cut off from the prospect of giving reasons, citing evidence and establishing the truth or falsity of propositions.”<sup>159</sup>

But moral propositions are, by nature, very different from statements of personal, private belief, for they refer to things that are “*universally* good or bad, right or wrong, just or unjust - which is to say, good or bad, right or wrong, *for others as well as for oneself*.”<sup>160</sup> Moral argument is about identifying the grounds on which any action is said to be justified. When we recognize that a particular act – for example, killing innocent life – is wrong, logic dictates that we “forbid that act to people generally or universally – which is to say, we forbid it with the force of law.”<sup>161</sup> Arkes notes:

(As Aristotle suggested,) polity arises from the capacity of human beings for moral judgment. The mark of a polity is the presence of law, and law . . . Arises directly from the logic of morals. We may say that the logic of morals (or the existence of moral propositions) virtually entails the existence of law and, with that, the existence of polity. We have law *only* because we have morals – only because it is possible to speak of things that are right and wrong . . . In the traditional understanding, law exists only because rights and wrongs exist, and the function of law – the purpose of the polity, is to do justice: it is to vindicate wrongs and cultivate a sense of morals and justice in the population.<sup>162</sup>

The idea of law as being founded on moral principles, is so essential that even the legal positivist H.L.A. Hart acknowledged that rules against murder, violence and theft overlap with basic moral principles and therefore possess a “necessary

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159. Ibid., 19.  
160. Ibid., 21.  
161. Ibid., 25.  
162. Ibid., 26.



nonarbitrary status” – for “such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all.”<sup>163</sup>

Law belongs to the logic of morals; moral propositions are universal by nature because they embody principles that are necessarily and categorically true.<sup>164</sup> Setting aside the modern contention that politics should not deal with questions of truth, let us consider necessary truths – “propositions that cannot be contradicted except with propositions that are themselves self-contradictory.” An example of this would be the law of contradiction. We cannot “know” the law of contradiction from existing definitions; rather we must comprehend it before we are able to grasp any definition in the first place.<sup>165</sup>

Necessary truths, like the law of contradiction, must be understood before we are capable of understanding other things. They cannot be ‘demonstrated’ in the sense of carrying out an experiment, because if these truths are not understood, anterior to experiments or ‘experience,’ we would have no basis on which to understand the experience. But when we speak in this way of propositions that must be grasped as necessary before we can know anything else – before we can know ‘secondary’ truths – we are speaking, in the strictest sense, of ‘first principles.’<sup>166</sup>

Another example of a necessary truth would be that human beings are rational – for to argue that they are not would entail providing reasons, and this is, of course, an act of reason. “The very posing of the challenge already presupposes the answer the

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163. Hart, H.L.A., “Positivism and the Separation of Law and Morals,” *The Philosophy of Law*, ed. R.M. Dworkin (Oxford: Oxford University Press, 1977), 36. Elsewhere Hart refers to this concept as the “minimum content of natural law.” See Hart, H.L.A., *The Concept of Law* (Oxford: Oxford University Press, 1961), 189-95.

164. Arkes, *First Things*, 27.

165. *Ibid.*, 51.

166. *Ibid.*, 52.

skeptics are seeking to resist.”<sup>167</sup> Another necessary truth is that morals exist. For if Smith, for instance, tries to argue that morals do not exist, he would have to claim that since he does not accept the existence of morals, nobody else would be justified in obliging him to respect the logic of morals. To make this claim, however, is to say that it would be *wrong* for anyone else to demand that Smith respect moral principles.<sup>168</sup>

One would have to use the logic of moral principles to refute the idea of moral principles.

Why, then, should there be any wonder that, at each moment of resistance, the skeptic finds himself backing into the grammar or logic of morals? We have the capacity for resistance and argument only because we have the capacity to give and understand reasons. As for the logic and language of morals, they are simply built into us. . . The person who seeks to deny the existence of morals will spend most of his days trying to flee from the perils of contradiction and the tangle of his own argument. He will discover, again, that for the man of reason the existence of morals must hold the place of a necessary assumption or a first principle in the ground of his understanding.<sup>169</sup>

So far, Arkes has established that first principles are universal, and that they are necessary truths – they cannot be contradicted except with a statement that is itself contradictory, and we must assume they exist before we can talk coherently about anything else. It is true that morals are sometimes disregarded, but this does not disprove their existence or their usefulness; indeed, this disregard is unavoidable to some degree since moral decisions are determined in the realm of freedom by agents who are capable of choosing their own course of action. It would make no sense to say that a rock is obliged to fall down when dropped and would therefore be wrong, or

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167. Ibid., 71.

168. Ibid., 76-77.

169. Ibid., 83-84.

blameworthy, if it did not. Blame or praise can logically attach only to an agent who is responsible. “That men are actually free to ignore the ‘requirements’ of morals – that they will suffer no impediments from the laws of physics as they ponder their duties and their inclinations – is the very mark of their freedom as moral agents.”<sup>170</sup>

Like the autonomy theory, the logic of morals presupposes that an essential quality of human being is the ability to freely choose one’s actions. But unlike the autonomy theory, the logic of morals holds that decisions can be right or wrong independent of consensus. Thus, there is bound to be imperfection in systems of law. But this does not invalidate the moral principles on which the law rests any more than the existence of oblongs disproves the idea of a perfect circle. As Arkes says, “The fact that the world is littered with imperfect and corrupt political orders – with flawed or even grotesque efforts to render a circle – cannot in itself invalidate the idea of morals or the understanding of a just political order.”<sup>171</sup> To suppose otherwise is to engage in self-contradiction.

The fallacy that forms the central premise in cultural relativism (is this): namely, that the presence of disagreement confirms the absence of truth. That is, the variety of opinion which exists on the nature of virtue and vice is usually taken in itself as proof of the proposition that there are no understandings of morals that are universally true. . . that is a proposition I cannot endorse, and the critical question may be how my own refusal to agree with this proposition would affect its validity. My disagreement establishes that the proposition does not enjoy a universal assent, and by the very terms of the proposition, that should be quite sufficient to determine *its own invalidity*.<sup>172</sup>

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170. Ibid., 53-54.

171. Ibid., 131-32.

172. Ibid., 132.

The point of this is not to insist that all legal systems must embody the same elaborate moral code beyond the minimum content of natural law. Rather, it is simply to point out that the logic of morals and the logic of law are the same. Citizens can debate among themselves and legislate the ways the laws's basic precepts should be applied in various contexts, but we are mistaken to believe that the law itself is, or should be, morally "neutral." Laws are framed, interpreted, and administered by human beings. Because they are human beings, neither lawmakers nor judges make decisions in a moral vacuum. The supposition that law must be silent on moral questions does not render a law that is "morally neutral," but rather, a law "in the service of a different morality."<sup>173</sup>

The Supreme Court's treatment of the area of free speech is a case in point. For although the First Amendment's free speech clause was devised to protect political speech -- that is, speech necessary to the workings of our republican form of government, in recent years it has increasingly been interpreted to mandate protection of obscenity and pornography. Robert Bork notes:

This area is the one in which the Supreme Court's capture by the philosophy of radical individualism is perhaps most blatant. For two centuries . . . Americans suppressed such expression. As late as 1942, a unanimous Court could say in *Chaplinsky v. New Hampshire* that prohibiting the "lewd and obscene, the profane, the libelous and the

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173. See Bork, Robert, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, D.C.: The AEI Press, 2003), 7: "The discredited theory of socialism is merely one manifestation of a strong preference for the universal over the particular, and the most universal and least individualistic social principle equality. Economic inequality being beyond reach, the attack turns to "lifestyle" inequalities, to a demand that we cease judging people and their actions according to the traditional moral scale. Traditionalists denounce this approach as moral relativism, but it is not that at all. Cultural socialists have their own moralities, often enforced with a fierceness unknown to upholders of the old moralities. That fanaticism is manifest in what we call "political correctness." "Nonjudgmentalism" is the first step toward a harsh judgmentalism in the service of a different morality.

insulting or ‘fighting’ words” had “never been thought to raise any Constitutional problem” because “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>174</sup>

And so, in the 1971 case *Cohen v. California*, when a young man walked into a crowded Los Angeles court house in 1968 wearing a jacket that said “F\*\*\* the draft,” Justice Harlan asked “How is one to distinguish this (word) . . . from any other offensive word?” Harlan claimed that there was no “readily ascertainable general principle” by which anyone could judge whether or not speech was offensive. “And for that sovereign reason, Harlan declared now with his colleagues that the decision as to what language is fit for a public place must be left ‘largely (in) the hands of each of us.’”<sup>175</sup>

Harlan’s assumption that “one man’s vulgarity is another’s lyric” is of course a staple of moral relativism. As Bork notes, “On that ground, it is impossible to see how law on any subject can be allowed to exist if any citizen disagrees with it. One man’s armed robbery is, after all, another’s just redistribution of wealth.”<sup>176</sup> Of course, Harlan defended the decision as an instance of protecting political speech. But if words are so subjective, how did he in fact know that the speech was political, or that Cohen was not, as Hadley Arkes puts it, literally encouraging those around him to “make love to the wind?”<sup>177</sup> Arkes explains:

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174. Ibid., 61.

175. Arkes, Hadley, *Natural Rights and the Right to Choose* (Cambridge: Cambridge University Press, 2002), 55.

176. Bork, *Coercing Virtue*, 62.

177. Arkes, *Natural Rights and the Right to Choose*, 55.

But we could know that Cohen was making a political speech precisely because words are not subjective in their import, and we could know these things for the same reasons that were brought forth, years earlier, to refute logical positivism: The functions of condemning or commending, of deriding or applauding, are moral functions, and they are rooted in our language. The words that carry these functions may change over time, but the functions persist, and if they do, it must be possible for most people to understand at any moment the words that are established in our language as terms of rebuke or praise . . . that moral function will always be contained in our language, because it is part of the constitution of our own natures, as moral beings.<sup>178</sup>

In the area of pornography as an expression of “speech,” the Court struck down a congressional statute that mandated that cable television channels “primarily dedicated to sexually-oriented programming” must “limit their transmission to hours when children are unlikely to be viewing.” The Court ruled that the pornographer’s right of expression prevails over the sensibilities of the audience, who must protect their own sensibilities “simply by averting their eyes:”

But many people will not avert their eyes, and that fact will certainly produce a moral and aesthetic environment which is impossible to ignore. . . . Indeed, the Court’s majority refuted its own avert-your-eyes solution when it said: “It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and society. It is through speech that our personalities are formed and expressed . . . It is not too much to say that the suffocating vulgarity of popular culture is in large measure the work of the Court. The Court did not create vulgarity, but it defeated attempts of communities to contain and minimize vulgarity. Base instincts are always present in humans, but better instincts attempt, through law and morality, to suppress pornography, obscenity, and vulgarity. When the law is declared unfit to survive, not only are base instincts freed, they are also validated.”<sup>179</sup>

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178. Ibid., 56-57.

179. Ibid., 64.

Another example of an interpretation of the law that, in deference to the god of personal autonomy, purports to be morally neutral is found in the Supreme Court's treatment of abortion. In *Roe v. Wade*, the Court supposed that the question of when life began was a personal question determined by one's experiences, religion and "moral standards." It was, in other words, a controversial moral issue, and for that reason the government could not presume to impose the protection of unborn life on women unwilling to carry a pregnancy to term. Writing for the majority, Harry Blackmun opined:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.<sup>180</sup>

The Court reconfirmed this principle in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, when it ruled:

Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not mandate our own moral code . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>181</sup>

Abortion, according to the Court, is moral issue and therefore beyond the scope of politics and the law. But if the law is not applicable to cases pertaining the "most basic principles of morality," we are left wondering to what it *does* apply. The Court's

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180. Quoted in Arkes, *Natural Rights and the Right to Choose*, 48.

181. *Planned Parenthood of South-Eastern Pennsylvania v. Casey* 505 U.S. \_\_\_\_, 112 S.Ct. 2791 (1992)

treatment of abortion is not an exemplification of a morally neutral law, but the vigorous assertion of a morality that deems personal autonomy to be a more important value than life itself. The result is that an entire class of *homo sapiens* is effectively rendered insignificant and outside the purview of the law.<sup>182</sup>

As jurisprudence goes in the U.S., so it often goes internationally, and vice versa. The U.S. Constitution and the Universal Declaration of Human Rights are both informed by a natural rights philosophy, and some scholars believe there is a reciprocal influence between the two. Louis Henkin notes:

One notable source for the catalog of rights in the Universal Declaration was the Constitution of the United States and its 200 years of interpretive jurisprudence. In turn, during the half century since the Declaration was proclaimed, it has been a rich source for new “rights instruments” and has enriched rights in older polities. Rights in the United States have not been overt, avowed beneficiaries of the Declaration, but they have not escaped its subtler influences.<sup>183</sup>

As was mentioned earlier, the drafters of the Universal Declaration intended to establish a moral standard based on human dignity to guide the creation of national constitutions. “The purpose of international concern with human rights is to make national rights effective under national laws and through national institutions.”<sup>184</sup>

Whereas Madison said that “if men were angels, no government would be necessary,” we might similarly note that “if national laws and institutions were fully effective . . .

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182. See Bork, *Coercing Virtue*, 12: “Courts inevitably assume the role of moral teachers. Normative values pronounced, even falsely, in the name of a constitution, often come to be accepted by the public and are then reflected and intensified in legislatures, schools, and other institutions.”  
183. Henkin, Louis, “The Universal Declaration and the U.S. Constitution,” *PS: Political Science and Politics*, 31 (September 1998), 512.  
184. *Ibid.*, 512.



there would be no need for international human rights laws and institutions.”<sup>185</sup> The Universal Declaration, then, is meant to provide a standard by which national actions may be measured. Henkin further notes:

The Universal Declaration . . . was designed to inspire national laws and national legal-political cultures. Was President Lyndon Johnson impervious, was he not responding, to what the Universal Declaration represented as he led the United States towards the Great Society? Influence is a continuing force, and a process. United States constitutional jurisprudence has developed in quantum leaps and by continuous seepage. Whether knowingly or unconsciously, the Declaration. . . and what it represents in the international culture of the past half century, has had its influence on the U. S. Constitution and on the laws of the United States.<sup>186</sup>

Because they are primarily moral principles, human rights norms do not emerge, as international law typically does, from questions of state interest. Rather, their origins lie in the “strongly held principled ideas (ideas about right and wrong)” of individuals, “and the desire to convert others to those ideas.”<sup>187</sup> Human rights norms are the product of collaboration of individuals within governments, international organizations, and non-governmental organizations (NGO’s). “These networks of nongovernmental organizations eventually need to secure the support of powerful state actors who endorse the norms and make normative socialization a part of their agenda. The process through which these early normative entrepreneurs bring the normative concerns to the attention of policymakers in powerful states is one of almost pure persuasion.”<sup>188</sup>

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185. Ibid., 512.

186. Henkin, 515.

187. Sikkink, “Transnational Politics, International Relations Theory, and Human Rights,” 2 of 5.

188. Ibid., 2 of 5.

Respect for human rights, then, may be largely at the mercy of the state. But human rights are often framed and put into play through the critical efforts of NGO's. Thus, the human rights that are said to be part of international law are not a simple reflection of national interests, but are also indicative of the activities of special interest groups.<sup>189</sup> Remember that universal human rights are meant to stand as moral principles directing the actions of states with regard to their citizens. But when the NGO's and U.N. committees which frame the rights are driven by a commitment to radical individual autonomy pursued under the guise of moral "neutrality" on the part of the state, human rights inevitably degenerate from moral principles to instruments of power.

This possibility is demonstrated in a recent article by William Schulz, Executive Director of Amnesty International USA, who notes with approval that human rights norms "reflect either the views of those who are at the moment holding the power, or the principles that have managed to claim a consensus among enough people that the powerful dare not challenge them."<sup>190</sup> Like Donnelly, Schulz finds the source of truth in consensus. He deems natural law too problematic because he does not believe it is possible to determine what characteristics are "of sufficient import to serve as a basis

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189. For example, Bork notes that feminist NGO's "lobby for universal rights of abortion and for mandatory proportional (50 percent) representation in legislatures." Furthermore, "Academics are another powerful group. Many of them maintain that their articles and their speeches at conferences constitute evidence of international law. The claims of NGOs and academics do nothing to lessen the ambiguity and opacity or to heighten the legitimacy of that law. Yet it is claimed that nations have no choice but to adhere to law made in this fashion." *Coercing Virtue*, 37-38.

190. Schulz, William, Fox, Robin and Francis Fukuyama, "The Ground and Nature of Human Rights: Another Round," *The National Interest* (Summer 2002); available from [http://web2infotrac.galegroup.com/itw/infomark/821/98/39907191w2/purl=rcl\\_EAIM\\_0\\_...](http://web2infotrac.galegroup.com/itw/infomark/821/98/39907191w2/purl=rcl_EAIM_0_...); Internet; accessed September 6, 2003, p. 1 of 10.

for the delineation of rights.”<sup>191</sup> He falls into the fallacy noted by Arkes of supposing that since natural law has been interpreted differently across the ages it cannot be true. Thus, he wonders, “What do we do with the ancient Uro people of Peru, who did not believe they were human at all and hence would a priori reject any notion of human nature? We tell them they are wrong, of course, just as we tell solipsists they are wrong on the grounds that the vast majority of us say they are.”<sup>192</sup>

For Schulz, the only legitimate ground for distinguishing right from wrong is what the majority of people believe. He argues that to determine the essence of human nature, we must not consult some small group, but rather the “widest possible number of responsible agents,” or “we risk having the rules set by a dictator, an elite or a cabal of power-mongers.”<sup>193</sup> Of course, if majority opinion is what makes something “right,” then a “responsible agent,” is, by definition, one who endorses the majority view. Furthermore, “universal” rights justified on such a basis are not permanent, for Schulz notes that human rights “evolve” like “all laws and standards:”

Human rights at the international level rely upon the same principle that the U.S. Supreme Court invokes when it determines that ‘evolving community standards,’ concerning what constitutes pornography or whether it is acceptable to execute the mentally retarded, influence the interpretation of justice . . . Rights that are grounded in international consensus - even “semi-sensus” – and elaborated in formal treaties and conventions are far more likely to be perceived as politically legitimate than notions of what Truth or Nature does or does not justify.<sup>194</sup>

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191. Ibid., 2 of 10.

192. Ibid., 2-3 of 10.

193. Ibid., 4 of 10.

194. Ibid., 5 of 10.

Schulz has implied that the chief problem with natural law is that its content is usually determined by elites who then proceed to impose their “views” on everyone else. Instead, he argues, truth is more accurately discerned through majority consensus. But then, he approvingly notes that “majority” opinion shall be articulated by elites like court justices, U.N. bureaucrats, and special interest groups within the U.N.<sup>195</sup>

### **Are Rights Really Universal?**

We have seen that attempts to define human rights without reference to transcendent standards cannot theoretically support universality. Donnelly correctly argues that there is no point in claiming a right to something that one already enjoys. In other words, rights *should* be conceptualized as devices for protecting the weak from the strong. But we have seen that without objective standards of good, there is no

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195. This particularly pertains to the International Criminal Court. Bork notes that this court “claims jurisdiction over every person in the world, and ratification was accomplished by nations representing less than half the world’s population, in collaboration with the newly potent nongovernmental organizations (NGO’s). NGO’s are passionate, often single-issue organizations within the tens of thousands, most of them from the United States.” He says that one of the main problems with the International Criminal Court is that “the court would have jurisdiction over a crime when either the state where the crime was committed or the state of the perpetrator is a party to the treaty or consented to jurisdiction.” So if an American had “allegedly committed a crime in a country that had ratified the treaty, the court would claim jurisdiction to try him even though America had not accepted the treaty. Alternatively, if Yugoslavia did not ratify and then massacred some of its own citizens, the ICC would have no jurisdiction.” (P. 35)

Pro-abortion NGO’s, faced with the fact that no human rights document specifically recognizes abortion as a universal right may rely on the Courts to secure their agenda. In a recent strategy session, the Center for Reproductive Rights, advocates “developing a jurisprudence that pushes the general understanding of existing, broadly accepted human rights law to encompass reproductive rights” by appealing to “treaty monitoring bodies,” “International and regional adjudicative bodies,” and by bringing “claims based on international law to national-level courts.” Abortion advocates admit that by working for abortion as a universal right in this manner “there is a stealth quality to the work; we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile victories will gradually put us in a strong position to assert a broad consensus around our assertions.” See U.S. Congress. House of Representatives. 2003. Representative Christopher H. Smith, “Documents Reveal Deceptive Practices by Abortion Lobby.” *Congressional Record – Extension of Remarks*. P. E-2537-E2538 (December 8).

guarantee that rights will not deteriorate into instruments of tyranny. The only way to avoid this is to justify rights according to universal principles -- applicable in all times and places, and not subject to conceptual tinkering, however well intentioned it might be. Only from such a basis can we ensure that rights are not used as devices to legitimize the desires of the strong, but truly protect the weakest and most vulnerable members of the human race.

Of the arguments for universal human rights, the most pervasive in today's law and politics is the autonomy view offered by Donnelly, Howard and Sloane. This argument supposes that in the absence of truth, the only way for human beings to live peaceably together is by making tolerance the highest social value. This requires a liberal democracy in which individual autonomy is valued *for its own sake*. But the idea that the only universal truth is that we must agree to disagree is logically meaningless; for the statement itself is nullified as soon as someone disagrees with it.

As much as the proponents of the culture of autonomy might protest otherwise, the fact remains that it is part of human nature to think and act according to moral principles. All of us, self-professed relativists and autonomists included, abide by rules we hold to be universally true. The question perhaps is not *whether* we should think in terms of universal values, but *what* should be regarded as universal.

Underlying the autonomy view is the assumption that there is no discernible human nature; that the essence of human nature is to be autonomous and self creating. If that is the essence of human dignity, then laws must revolve around that principle and uphold personal liberty as the highest social value. The struggle for human rights is

thus the fight to establish a worldwide culture of individual autonomy. But this comes with consequences: Life is not sacred but merely instrumental, valuable only insofar as it is a vehicle for the realization of the “self.” If autonomy is the highest value, there are no grounds to criticize the actions of others who are simply acting autonomously. Ultimately, this argument results in a kind of tyranny where the law, while professing to be completely neutral on questions of value, actually advocates an alternative morality altogether that is actually subversive to the cause of human rights.

How did we get to this point? Is the notion of radical individual autonomy a bastardization of the natural rights philosophy out of which the notion of universal human rights has grown, or merely its logical consequence? In the next two chapters, we will examine the progression of political philosophy from Plato to Locke to consider this question. In Chapter 4 we will turn to the work of Thomas Aquinas to reconsider the question of whether there really are any universal rights, and if so, what they might be.

## **Chapter 2: Soul Keeping and State Building: Principles and Politics from Plato to Machiavelli**

*And I suppose that until now no greater good has arisen for you in the city than my service to the god. For I go around and do nothing but persuade you, both younger and older, not to care for bodies and money before, nor as vehemently as, how your soul will be the best possible.*

*You should think this one thing to be true: that there is nothing bad for a good man, whether living or dead, and that the gods are not without care for his troubles.*

– Plato’s “Apology of Socrates”

*If one considers everything well, one will find something appears to be virtue, which if pursued would be one’s ruin, and something else appears to be vice, which if pursued results in one’s security and well-being.*

*A prince, and especially a new prince, cannot observe all those things for which men are held good, since he is often under a necessity to maintain his state, of acting against faith, against charity, against humility, against religion. And so he needs to have a spirit disposed to change as the winds of fortune and variations of things command him, and as I said above, not depart from good, when possible, but know how to enter into evil, when forced by necessity.*

– Niccolo Machiavelli, “The Prince”

In Chapter 1, we explored some typical arguments for universal human rights.

We found that whether thinkers explained the concept of universal rights according to a normative theory of human nature (stressing empathy or autonomy as the definitive human characteristics), or via a “scientific” avenue such as evolutionary theory, the outcome was the same: every argument, to the extent that it partook of the cup of

secularism, failed to sustain the idea of universality. We concluded the chapter with the argument that the concept of human rights is inextricably tied to the idea of objective moral principles. To remain intelligible, the concept of universal rights must define the person as existing in relation to a larger whole, which is not merely the sum of human beings, but an objective truth transcending humanity itself.

This idea is certainly not new. It was of course the point from which the classical and medieval philosophers took their bearings. Yet they expounded a comprehensive philosophy of politics and human nature without ever resorting to the terminology of rights. When and why did the language of rights become necessary for understanding human beings in relation to each other? If, as argued in Chapter 1, our current language of human rights is inadequate for universality, what set today's concept of human dignity so far adrift from what appears to have been its original philosophical mooring?

In this chapter and the one following, we will trace the changing relationship of moral principles to politics, from classical philosophy through Locke. This chapter will cover some of the works of Plato, Aristotle, Augustine and Machiavelli. It is by no means intended to be an exhaustive study of their work, but rather, a general survey of their views regarding the connection between truth and politics. The aim, then, is to bring these pre-modern thinkers into a conversation with each other with regard to this particular point.

We saw in Chapter 1 that a theory of universal human nature cannot be supported when personhood is untethered from the anchor of objective standards. But



Donnelly and those who would ground human rights in autonomy rather than truth (a position which perfectly represents the late twentieth century *Zeitgeist*) seem to believe that their philosophical wellspring is watered by Locke. Have they misinterpreted Locke, or is there something in his thought that makes their positions inevitable?

The classical and medieval philosophers talked much about truth, but not at all about rights. Modern thinkers speak of rights, but not truth. An important question then, concerns how the emergence of *rights* talk in our political discourse relates to the decline of truth as a standard for law and politics. Have we distorted the original understanding of natural rights, or is the notion of natural rights itself inimical to the idea of objective moral principles? Put differently, have today's human rights advocates bastardized the tradition of Locke, in whom the concept of natural rights reaches fruition, or are they rather its true philosophical heirs?<sup>1</sup>

### **Natural Right: The “Philosophic Quest for the First Things” in Plato and Aristotle**

The idea of a transcendent standard outside the political order figures heavily in the writings of the writings of the ancient Greeks. We find it, for example, in Sophocles, whose *Antigone* disobeys the law of the city in deference to a higher, unwritten law. In Plato, the idea is most succinctly expressed in the theory of the forms,

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1. This chapter, then, is about the difference between the underlying assumptions of classical theories of natural law and natural right and the modern understanding of natural *rights*. Although natural right and natural law both stipulate an ordered universe in which objective truth stands as a measure of human actions, there is a distinction between the two: While natural right assumes the existence of objective truth, that truth is not entirely known or knowable. Natural law, fully expounded by Thomas Aquinas, presumes a more comprehensive knowledge of truth via the benefit of revelation. But for our purposes, the differences are far less significant for understanding human nature than the fact that both traditions stipulate that human beings are defined in terms of their relation to a normative order. The main question to be answered, then, concerns man's relation to the whole -- how and when our concept of that shifted, and the way it affects our understanding of the ends of politics.

which holds that reality is that which is permanent and unchanging, as opposed to the contingent world of human action and experience. The form of the Good is the ultimate reality. We are most fully “ourselves,” i.e., most fulfilled in our nature, when we seek and understand the idea of the Good.<sup>2</sup> This idea is essentially what Strauss termed classical “natural right,” or the “philosophic quest for the first things,” which “presupposed not merely that there are first things but that the first things are always and that things which are always or are imperishable are more truly beings than the things which are not always.”<sup>3</sup>

For the classical philosophers, man’s purpose is to unite himself, through thoughtful action directed by a well ordered soul, with the eternal good. Human nature reaches its fulfillment when the order of the soul perfectly imitates the order of nature, the idea of the Good. Given this purpose of human being, then, politics must cultivate the virtues that lead to a well-ordered soul. “The city has therefore ultimately no other end than the individual. The morality of civil society or of the state is the same as the morality of the individual.”<sup>4</sup>

And yet, despite the fact that the city’s end is the virtue of the citizen, the two are different; the city, with needs that are temporal, perishable, and specific -- often clashes with the individual, whose ends are permanent, universal, and divine. Hence, there is a necessary tension between the needs of political life and the highest life simply. Ironically, this tension finds its most poetic expression in the work of the

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2. Weinreb, Lloyd, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987), 31.  
3. Strauss, Leo, *Natural Right and History* (Chicago: University of Chicago Press, 1950), 89.  
4. Strauss, p. 134.

philosopher Plato. Plato believed in the first principles that would be necessary to ground an intelligible account of universal human rights. But although Plato held the image of the Good to be essential to the best regime, this led him to the implication that an irreconcilable tension existed between the needs of the city and the highest life. Let us turn to two Platonic dialogues, *The Republic* and *The Laws* to see how this is so.

### *Plato's Republic: The Best Regime*

Plato's *Republic* is a dialogue between Socrates and a number of young men regarding the nature of justice. It consists of ten books. Book I is a discussion of the nature of justice in general. In Books II-IV, Socrates constructs a "city in speech" for the purpose of magnifying the question of justice, so that, having been seen on a larger level, it might be more easily recognized in the individual. In Books V-VII, Socrates shows that the city in speech cannot exist unless it is ruled by philosophers. Books VIII-IX discuss the way that various types of political regimes come into being and pass away. Finally, Book X is a poetic explanation of what justice means for the man who is truly just.

The key question of the *Republic* is whether justice is *natural*, existing as a transcendent standard above the realm of human action, or *conventional* (the view of Thrasymachus), a product of human will and therefore unavoidably expressed as the will of those in power. Thrasymachus challenges the idea of natural justice with a charge Socrates never fully answers:

Justice and the just are really someone else's good, the advantage of the man who is stronger and rules, and a personal injury to the man who obeys and serves. Injustice is the opposite, and it rules the truly simple

and just; and those who are ruled do what is advantageous for him who is stronger, and they make him whom they serve happy but themselves not at all. And this must be considered, most simple Socrates: the just man everywhere has less than the unjust man . . . the just is the advantage of the stronger, and the unjust is what is profitable and advantageous for oneself. (343c-344c)<sup>5</sup>

If justice is “really” the will of the stronger, while injustice is defined as whatever is “profitable and advantageous for oneself,” then what Thrasymachus means to say is that only real “good” is having the power to satisfy one’s own interests. “Justice” is simply the name we give to the good of those in power -- it is conventional.

But it is significant that despite his venomous attack on the idea of natural justice, Thrasymachus is still careful to distinguish the “truly” just from the “really” just -- a design Machiavelli would later trace in his pledge to uncover the *effective*, rather than the *objective* truth. Injustice rules “true” justice in the world. Those who strive to be good are merely simpletons in the face of life’s harsh realities, and the man who is *truly* just always has less than the man who is not. Thus, Thrasymachus does not deny the existence of true justice, but considers it to be irrelevant in a world where might trumps right.

Socrates, evading the fundamental truth of this assertion -- that unjust men often do profit at the expense of those who are just -- begins to prod Thrasymachus into claiming that injustice itself is *truly* good.

S: Is justice then vice?

T: No, but very high-minded innocence.

S: Do you call injustice corruption?

T: No, rather good counsel.

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5. Plato, *Republic*, trans. Allan Bloom (New York: Basic Books Inc., 1968).

S: Are the unjust in your opinion sound as well as prudent, Thrasymachus?  
T: Yes, those who can do injustice perfectly. (348c-d)

Remember that Thrasymachus has defined the good as whatever is good for oneself. The unjust are “prudent” because they know how to get what they want -- for prudence, of course, regards the direction of actions. But to say the unjust are prudent is not to call them *good*, for Socrates himself says that prudence can be used for either good or bad, for “it never loses its power, but according to the way it is turned, it becomes useful and helpful, or again, useless and harmful.” (518e) Prudence is not wisdom, which concerns the attainment of the Good. So far, Thrasymachus has not strayed from his original distinction between true justice and its earthly manifestation.

At this point, Socrates begins to speak for Thrasymachus:

Plainly, you’ll say that injustice is fair and mighty, and since you also dared to set it down in the camp of virtue and wisdom, you’ll set down to its account all other things we used to set down as belonging to the just. (348e-349a)

Although Thrasymachus, losing interest in further discussion, accepts Socrates’s restatement of his position, it should be noted that the argument has changed tack. For Thrasymachus’s own claim was that in reality unjust men profit at the expense of just men. In Socrates’s rendering, the claim is transposed to mean that there are no absolute values, or real distinctions between good and bad. From the relativity of values, it is but a short way to demonstrating the circularity of all argument and the meaninglessness of all discourse. (349b-350c) At this point, Thrasymachus, apparently defeated, vows to remain quiet for the duration of the discussion, feigning agreement with anything Socrates says. (350d). Socrates, then, has shown that obliterating the distinction

between good and evil precludes meaningful discourse, but he has not refuted Thrasymachus's original claim -- the only one spoken in his own words -- that in reality, it is the bold assertion of human will, and not its supplication to higher principles, that often determines the course of worldly affairs.

The real issue of Book I, then, is precisely whether justice -- that is, the Good, or Truth -- exists and makes a difference to human life. After Thrasymachus has slunk off to the background, Glaucon steps up and wants to know if there is "a kind of good that we would choose to have not because we desire its consequences, but because we delight in it for its own sake?" (357b) Thrasymachus had said that men disdain injustice "not because they fear *doing* unjust deeds, but because they fear *suffering* them." (344c, emphasis added) Clearly laying out the terms of what modern philosophy would embrace as social contract theory, Glaucon says:

They say that doing injustice is naturally good, and suffering injustice bad, but that the bad in suffering injustice far exceeds the good in doing it; so that, when they do injustice to one another and suffer it and taste of both, it seems profitable -- to those who are not able to escape the one and choose the other -- to set down a compact among themselves neither to do injustice nor to suffer it. (358e-359a)

To illustrate the point, Glaucon recalls the story of the ring of Gyges, in which a magical ring renders its wearer invisible. He notes that in such a case, where one is guaranteed impunity from punishment, "we would catch the just man red-handed going the same way as the unjust man out of a desire to get the better, this is what any nature naturally pursues as good, while it is law which by force perverts it to honor equality." (359c)

Adeimantus adds that Glaucon's question cannot be answered by appealing to divine authority, given what is known about the nature of the gods:

Surely it isn't possible to get away from the gods or overpower them. But if there are no gods, or if they have no care for human things, why should we care at all about getting away? And if there are gods and they care, we know of them or have heard of them from nowhere else than the laws and poets who have given genealogies; and these are the very sources of our being told that they are such as to be persuaded and perverted by sacrifices, soothing vows and votive offerings . . . Of what profit is justice in itself to the man who possesses it, and what harm does injustice do? . . . Show what each in itself does to the man who has it -- whether it is noticed by gods and human beings or not -- that makes the one good and the other bad. (365d-e, 367d-e)

The question, then, is how justice is good and injustice bad for the man who practices one or the other, excluding all public rewards and punishments. How does justice benefit one's *soul*, unseen by men and apparently inconsequential to the gods, who care more for human flattery and supplication than for human beings themselves? Justice can be loved for its own sake only if it is necessary to one's soul -- and the soul is of consequence only if it is part of a larger order that transcends particular human knowledge and experience.

This seems to speak to the heart of Thrasymachus's challenge; and it is significant that just as the problem has been presented in its clearest terms, Socrates evades an answer, redirecting the question of justice from the individual soul to the level of the city. The city and the soul are alike insofar as both remain healthy when they best fulfill their end. Just as the purpose of the individual is to achieve a self-sufficiency, or wholeness, through the rule of the passions by the intellect, the city exists to attain a self-sufficiency of all that is lacking in its individual members. (369b)

The city begins to fall away from health when it seeks, not simply what it needs, but all those “luxurious” things which cater to the passions, including fancy foods, furnishings, clothing, jewels and entertainment. (373a-c) As the city becomes ever more immersed in the pursuit of *things*, the land it possesses is insufficient. Thus, “we must cut off a piece of our neighbor’s land,” and “they in turn from ours, if they let themselves go to the unlimited acquisition of money, overstepping the boundary of the necessary.”

(373d) War, then, is caused by materialism. It begins when the city neglects its primary purpose -- self-sufficiency -- for the gratification of the passions. Interestingly, it is only when the city is already unhealthy, and in danger of invasion by other territories, that there arises the need for a guardian class (out of which will emerge the philosopher king) (374a)

If the purpose of the city is self-sufficiency, then the way to restore the city to its original health is to refocus its sight on that alone which is self sufficient, and loved for its own sake: truth, which may be considered to be the first principle; the unchanging, eternal fact. It is here that Socrates begins to speak of the *god* as opposed to the *gods*:

The god is not the cause of all things, but of the good . . . Do you suppose the god is a wizard, able treacherously to reveal himself at different times in different *ideas*, at one time actually himself changing and passing from his own form into many shapes, at another time deceiving us and making us think such things about him? Or is he simple and does he least of all things depart from his own *idea*? . . . Are (not) things that are in the best condition least altered and moved by something else? . . . In this way, the god would least of all have many shapes. (380c-381b)

It is pointless to be moral if the gods are capricious in their judgment; but the *god* as described by Socrates is steady -- unchanging, affecting but unaffected by human



opinion. God cannot lie or deceive, because God is pure reality itself, giving existence to all that is good. For Plato, then, the highest perfection of a thing lies in its origin. The city may be restored to health only by returning its focus to its original, singular purpose of self-sufficiency. This calls for rule by those who live according to the intellect, the most self-sufficient aspect of human nature. Philosophers seek wisdom, which in turn seeks truth -- the only thing loved for its own sake. Only they can see beyond human opinion to the unchanging form of the good:

Philosophers are those who are able to grasp what is always the same in all respects, while those who are not able to do so but wander among what is many and varies in all ways are not philosophers . . . (philosophers) are always in love with that learning which discloses to them something of the being that *is* always and does not wander about, driven by generation and decay. (484b-485b)

Thus, only philosophers can rule in accordance with reality:

They would look away frequently in both directions, toward the just, fair and moderate by nature and everything of the sort, and again, toward what is in human beings; and thus, mixing and blending the practices as ingredients, they would produce the image of man, taking hints from exactly that phenomenon in human beings which Homer too called god-like and the image of god. (501b)

Philosophers understand what is just, fair and moderate *by nature*: It is the essential source from which all good things flow. It is the *idea* of the good, or natural right (505a-b). Standing above all human opinions, it is perhaps only partially accessible to human reason; nevertheless, the wise can discern “what looks like a child of the good and most similar to it.” (1506e)

Socrates uses the examination of justice at the city level to bring forth the notion of the “idea” of the good. It is perhaps through this concept that he comes closest to

responding to Thrasymachus's claim. For Thrasymachus had held that justice is the will of the stronger because in reality -- that is, in our observation of the workings of human nature in the world -- that is what we see. Even today, it is most difficult to dispute this claim. Now, as we said earlier, Thrasymachus had distinguished the "real" from the "true," (that is to say, the "is" from the "ought") indicating that he too had some understanding of what is right by nature.

Thrasymachus will be defeated, then, only when it can be shown that the *real* and the *true* are the same. This is precisely what Socrates endeavors to do in Book VII's Allegory of the Cave. He describes the human condition as the situation of one imprisoned in a cave, bound at the legs and neck. The prisoner faces a wall which is covered with shadows, cast by objects passing before a distant fire. Unaware that he is bound and immobile, and, never having seen the fire burning from behind, he mistakes the shadows for reality. (514a-515c) Now, if the prisoner could somehow manage to turn and look at the fire, he would know that what he mistook for "reality" actually had its source in something else. And if he could break free of his shackles and step out of the cave and into the sunlight, he would find that even the fire, the source of the opinions in the cave, in turn has its source in something higher. Thus Socrates explains that all our opinions, to the extent that they are *real*, are informed by the idea of the good:

In the knowable the last thing to be seen, and that with considerable effort, is the *idea* of the good; but once seen, it must be concluded that this is in fact the cause of all that is right and fair in everything -- in the visible it gave birth to light and its sovereign; in the intelligible, itself sovereign, it provided truth and intelligence -- and that the man who is going to act prudently in private or in public must see it. (517c)

Socrates teaches that most people, imprisoned in their own dark caverns of opinion, are unaware that a higher reality exists outside human experience, rendering human opinion insignificant by comparison. Just as the sun is not merely light, but the source of all light, the idea of the good is not knowledge, but the source of knowledge. Human intelligence, therefore, is meaningful only insofar as it returns to the source from whence it came:

The soul is also characterized in this way. When it fixes itself on that which is illumined by truth and that which *is*, it intellects, knows, and appears to possess intelligence. But when it fixes itself on that which is mixed with darkness, on coming into being and passing away, it opines and is dimmed, changing opinions up and down, and seems at such times not to possess intelligence. (508d)

Politics, then, is the “art of turning around” -- directing the regime away from the shadows and toward the light. One rules well by virtue of knowledge, and knowledge is the discovery, rather than the creation, of ideas. (518a-e) Those most fit to rule are the ones least willing to do so, for the philosophers know that true happiness resides *outside* the city, beyond the realm of opinion; yet they are the only ones in a position to benefit the city, for only they can point it to something beyond itself.

In this way, Plato implies that a tension exists between the needs of politics and the highest human life. The relationship between philosophy and the city is both symbiotic and antagonistic. Just as the soul animates the body, philosophy, in its grasp of the universal and eternal, acts as the life force of the political regime, which, like the body, is temporal and particular by nature. The city survives only to the degree that it ascends to the realm of philosophy, and philosophy thrives only to the degree that it

descends to politics, for the philosophical life is not possible unless the city itself accommodates it.<sup>6</sup> Thus, we find in Plato a certain “lack of fit” between the end of human life and the conditions for achieving it.

Given the fact that the city is repulsed by that which it needs most (witness the death of Socrates); given the vast unlikelihood of the occurrence in which those in power are indeed truly just (546a); given the fact that justice on the level of the city requires subverting one’s own individual happiness to the common good (419a-420b), we realize that the refutation of Thrasymachus, in the end, depends on faith -- that is, on the belief that it is better to die with a well ordered soul than to live in any other manner, and the conviction that the harmony of one’s (unseen) soul is to be preferred to all the world’s riches, comforts or power.<sup>7</sup>

### *The Laws: The Second Best Regime*

The *Laws* is Plato’s exposition of the “second best” regime, and one might initially think it offers a “practical” alternative to the *Republic*’s regime of philosopher kings. Upon closer examination, however, we find that it strives no less than the *Republic* to establish the importance of soul to politics, and therefore demonstrates to an

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6. See Books VIII and IX, where Socrates leads an extensive discussion on the coming into being and passing away of the various types of regimes.

7. In Book X’s Myth of Er, Socrates suggests that the slings and arrows of life are minuscule when we accept that our lives are not reality itself, but only a small part of something greater. See 613a, 614a. In the interpretive essay that follows the translation, Bloom sums up the issue this way: “The soul is *the* philosophic question, and it is his concern for this question that distinguishes Socrates from his predecessors; the most characteristic part of his teaching is that soul is irreducible and that it is somehow the principle of the *cosmos*. . . he can understand man and understand nature, for the two are informed by the same principle, soul. The *Republic*, which seems to give a completed teaching about politics and the soul, ends with a return to philosophic doubt, to the conviction that one’s opinions are open to unanswered, if not unanswerable, questions. In one sense one can even say that the book has taught us nothing other than the necessity of philosophy and its priority and superiority to the political life.” (p. 435)

equal degree the necessity of philosophy for good rule. We shall also find that no less than the *Republic*, the *Laws* indicates that Plato's comparison of the individual soul with the political regime is wholly unsatisfactory.

The dialogue occurs between three old men, the main character being a nameless Athenian Stranger, perhaps Socrates, who teaches that the purpose of politics is to nurture soul, the essence and "general principle" of human nature. (318a, 650b)<sup>8</sup> Now, as the *Republic* demonstrated, the case for politics as the art of soul keeping depends on refuting the claim that justice is the will of the stronger and that politics, accordingly, is only about power or survival. Echoing the dialogue of *The Republic*, the Athenian Stranger explains that this claim depends on the idea that the gods are either nonexistent or uncaring about human things. And although he seems to agree that the gods of the city are fictitious, this leads him not to a gaping void, but to a higher reality surpassing conventional deities. Indeed, he launches a potent defense not of *gods*, but of *God*. Socrates employed poetry to this end (through the Allegory of the Cave and the Myth of Er); the Athenian Stranger, in Book X, uses logic. He presents what the natural law tradition would come to understand as the theory of the unmoved mover, holding that the governing force of the universe is something that acts upon all, but is not acted upon itself. (892a-895b) Against materialism, the Athenian asserts that the first principle of nature cannot be "fire, water, earth and air" but is rather something *animate*, like soul. If soul is primary, then the things pertaining to it are prior to those concerning the body and the rest of the material world:

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8. *The Laws of Plato*, trans. Thomas L. Pangle (Chicago: University of Chicago Press, 1980).

Opinion then, and supervision, intelligence, art, and law would be prior to hard things, soft things, heavy things and light things . . . Nature is the coming into being connected with the first things. But if soul is going to appear first, and not fire or air, and it's soul that has come into being among the first things, it would be most correct, almost, to say that it is especially by nature. These things are so if someone should demonstrate that soul is a being elder than body, but otherwise not at all. (892b-c)

To comprehend Nature, or the first cause, all we need to do is observe that things around us -- oceans, planets, stars, animals -- move. All motion we can observe is only the latest among a long chain of transformations:

Now the coming into being of all things takes place when what experience occurs? Clearly, when the original cause, obtaining growth, proceeds to the second transformation, and from this to the next, and, when it arrives at the third, it allows of perception by perceivers. By this transformation and change everything comes into being. (894a)

Inanimate objects may move -- waves crash on the shore, leaves rustle in the wind; but *something* must have caused the motion. And only something that is *alive* is “always capable of moving itself as well as others.” (894b) Furthermore, the first cause must possess not only the power to move, but also the ability to do so *willingly* -- for even slugs and bugs can creep and crawl, but they do so out of *instinct*, ultimately driven by the force of something else. Human beings, possessing reason, also have the ability to undertake actions freely, and in this way intelligence is most like the principle of soul. Hence, soul is responsible for our doing good or evil, and is therefore the proper aim of political rule. And of course, this requires government by those who can best direct the citizens toward the intangible goods of the soul (898d):

Soul then drives all things in heaven, on earth, and in the sea through its motions -- which are named wishing, investigating, supervising, deliberating, opining correctly and falsely, rejoicing, being pained, being

bold, being fearful, hating, and desiring -- and though all the motions that are akin to these or primary; these take over the secondary motions of bodies and drive all things to growth and decay. . . soul makes use of all these and, every time it takes as a helper Intelligence -- god, in the correct sense, for the gods -- it guides all things toward what is correct and happy, while when it associates with lack of intelligence it produces in all things just the opposite to these. (897a-b)

In this way, wisdom is the sole link to the good and is therefore superior to the gods. *God* in the correct sense is not the typical god described by the poets, but rather, the Good that can be attained only through wisdom.<sup>9</sup>

Although *The Laws*, like *The Republic*, offers a sound teaching on the soul, like the *Republic*, its specific political recommendations are wholly unsatisfactory. In this way we are left to wonder if it really does provide a “practical” alternative after all. *The Republic*, which concerned the education of the guardian class and, admittedly, looked not to the good of the individual, but of the whole, seemed to call for the complete obliteration of one’s sense of self: not only must private property be abolished, but family relationships as well. Even what might be thought of as the most singular aspect of oneself -- one’s sexuality -- would be eradicated through the unerotic joint gymnastics of men and women and the communal marriages of the guardian class. *The Laws* offers much of the same, only applied to the education of ordinary citizens as opposed to the “golden” class. Because the laws purports to offer a solution that is not

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9. If the greatest of human goods is the soul, and the gods are the immediate supervisors of the soul, then it would make not sense for them to be careless or unconcerned. For just as the doctor tends to both the small and large parts of the body and the mason holds the small stones in no less importance than the large ones, so the gods must be regarding all human affairs, for we should never “judge the god, at least to be less than mortal craftsmen.” (902e)

ideal, but more practicable, it is worth examining more closely how well this addresses the real needs of human beings.

After providing a lengthy account of how the law should be structured (to honor the things of heaven rather than earth) the Athenian Stranger then turns the discussion to the “human things” which consist “above all in pleasures and pains and desires.” (732e) Although the philosophically inclined will obey the law willingly, most of the people -- driven by the desire for food, drink and sex -- will not. For them the Athenian recommends a regime very much like an efficient day care center -- one which will occupy them with stories and games (804b) and supervise every aspect of life. Those who are not philosophic, according to the Athenian, cannot grasp the true nature of the good. Therefore, their every pursuit must be governed. For if people are not capable of true virtue, that is, of the love of the wisdom that orders the soul, then they must at least be restrained from loving the wrong thing -- be it the “erotic love of wealth that prevents a person from having leisure to look after anything except his private possessions,” or the love of power which regulated interactions through violence (831-32c)

Unfortunately, it is not merely money or material things that citizens must avoid loving too much -- the principle also extends to their families, friends, religion and education as well. Just as in the training of the guardians in the *Republic*, there is no sense of the private, for marriages are officiated, children conceived and domestic disputes resolved with one purpose in mind -- the health of the city. The city even takes precedence over the most natural bond of all, that between mother and child, since a



man must “cherish his land, as part of the fatherland, more than children cherish their mother” (740a) and fertile couples must hand their offspring over to a childless couple, if need be. Even religion must be banished from the private sphere, lest unsupervised citizens worship in the wrong way. (910c) The same approach applies to matters of education, which is provided only to the extent as is *necessary* for the good of the city. Citizens learn only as much as is needed for “war, household management, and the management of the city.” (809c)

The Athenian implies, then, that if one’s total energy cannot be directed toward philosophy, then it must instead be channeled completely into civic life. But this rubs against the grain of human nature. Replacing the particular attachment to home and family with the generalized love of polis is like burning the trees to save the forest. The art of politics, after all, concerns not just the city, but the citizens who comprise it. The Athenian claims that the good of the city is necessarily one’s own good, but never adequately explains why this is so. He overlooks the value of particular relationships (i.e., love) between family and friends in fostering social stability and virtue; something Aristotle argues for quite persuasively in the *Ethics*.

In the end, Plato provides us with a valuable teaching on the importance of first principles to politics -- namely, that unless the political regime is nourished and sustained by truth, growing in it as a flower in the sunlight, unless it is capable of pointing beyond itself, it will inevitably deteriorate. But in attempting to draw a precise analogy between the regime and the individual soul, Plato leaves us feeling most uneasy, for both *The Republic* and *The Laws* require citizens to deny any part of their

humanity that concerns the body as well as the soul. If the regime is to be modeled on soul, then Plato seems to teach that its non-philosophic members must exist for the sake of civic life just as the body must exist for the sake of the soul. But the city, after all, is composed not of heads and hearts and limbs, but of individuals -- and every individual, from philosopher king to simple artisan is a composite of intellect, heart and body. The people of Plato's regimes do not appear to be whole. The uneasiness that Plato evokes may indeed stand as testament to the fact that political regimes *cannot* be compared to individuals; that the two differ not just in size, but in kind.<sup>10</sup> The opposite charge can be leveled at liberalism, which may be more accurate in understanding the dynamics between, rather than within, nations. For liberalism, while appropriate for explaining the interaction of impersonal *entities* in the sphere of world politics, nevertheless rings hollow in its treatment of the individual. Both philosophies are appropriate in their own sphere; both are guilty of a certain simplification -- Plato, in his treatment of the regime, and liberalism in its treatment of the individual.

*Aristotle and Human Happiness: The Perfect and the Possible*

In both the *Republic* and the *Laws*, Plato's best and second best regimes require that the transcendent standard of the Good be discerned and upheld as a standard for the

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10. This was certainly one of Aristotle's criticisms of Socrates. He says that "it is best for the city to be as far as possible entirely one; for this is the presupposition Socrates adopts. And yet it is evident that as it becomes increasingly one it will no longer be a city. For the city is in its nature a sort of multitude, and as it becomes more a unity it will be a household instead of a city, and a human being instead of a household; for we would surely say that the household is more a unity than the city, and the individual more than the household. So even if one were able to do this, one ought not do it, as it would destroy the city." See *The Politics*, trans. Canes Lord (Chicago: University of Chicago Press, 1984)2.2.1261a15-22

political regime. Aristotle's purpose is the same, and both the *Nicomachean Ethics* and the *Politics* open with a discussion of the good. In *The Politics* he says:

Since we see that every city is some sort of partnership, and that every partnership is constituted for the sake of some good (for everyone does everything for the sake of what is held to be good), it is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. This is what is called the city or the political partnership. (1252a1-5)<sup>11</sup>

The aim of politics, then, is not merely the protection of life and property, but the achievement of the most authoritative good for human beings.<sup>12</sup> Thus, politics itself will be shaped largely according to our understanding of "the good." Therefore, let us concentrate on Aristotle's *Ethics*, which presents an extended discussion of the nature of the good. In this way, we will determine how Aristotle views the relationship between principle and politics.

Like Plato, Aristotle does not doubt the existence of a transcendent good, but unlike Plato, he questions its precise applicability to human affairs, for how will anybody "be a better physician or general for having contemplated the absolute idea?" (I.vi.1097a9-11)<sup>13</sup> In Aristotle's view, the good is best determined, not by gazing at a pattern in the sky, but by observing human actions, and discovering the end to which they tend. Thus, while Plato finds the good to be a paragon, a pure form of which all human endeavors are at best an imitation (and therefore a falling away), Aristotle sees

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11. Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984).

12. For more on Aristotle's views regarding the idea of the city as tending to a higher good, see Ambler, "Aristotle's Understanding of the Naturalness of the City," *Review of Politics* 47 (1985), pp. 163-185.

13. Aristotle, *The Nicomachean Ethics*, trans. H. Rackham (Cambridge: Harvard University Press: 1926).

the good as welling up from below: it is the *end* of human actions (and therefore a fulfillment of them); “that for the sake of which everything else is done.”

(I.vii.1097a19) He says:

The supreme good seems to be something final. Consequently, if there be some one thing which alone is a final end, this thing -- or if there be several final ends, the one among them which is the most final -- will be the Good which we are seeking. In speaking of degrees of finality, we mean that a thing pursued as an end in itself is more final than one pursued as a means to something else . . . Now happiness above all else appears to be absolutely final in this sense, since we always choose it for its own sake and never as a means to something else. (NE, I.vii.1097a28-1097b3)

The supreme good is *final*, existing only for its own sake, and *self-sufficient*, lacking nothing. This of course is very similar to Plato’s description of truth, which as the first cause is that which is most self-sufficient. In this way, Aristotle does not really depart from the viewpoint of his teacher, but simply supplies the omega to Plato’s alpha. He provides an alternative way to making the good intelligible -- not by looking up to the sky, but by examining the things of the ground, more readily detected in their proximity. Thus, in Aristotle’s own words, “by changing its ground the argument has reached the same result as before.” (I.vii.1097a.25)

In human beings, the supreme good is happiness, for only happiness is loved for its own sake. It is not employed in the pursuit of anything else, but being “final and self-sufficient, is the end at which all actions aim.” (I.vii.1097b20) If all things tend to particular ends, it would logically follow that happiness, man’s most singular end, must be achieved through man’s most singular aspect -- that is, his *telos*. To be happy is to

live in the manner that man alone is capable of, that is, to live virtuously, according to “the practical life of the rational part of man.”(I.vii.1098a1-5)

It follows that the Good for man is the active exercise of his soul’s faculties in conformity with excellence or virtue, or if there be several human excellences or virtues, in conformity with the best and most perfect among them. Moreover, this activity must occupy a complete lifetime. (I.vii.1098a 15-20 33)

As we learned in Plato, the Good must be thought of as eternal, unchanging and self-sufficient -- the unmoved mover. Human happiness is complete to the degree that it imitates the Good. Humans imitate the Good through continuous activity directed by the most self-sufficient aspect of man’s nature, the intellect. This is considered virtuous activity. The virtues, then, are those activities which are performed for their own sake and not for any external rewards or recognition. Now, if the general good for man consists in the exercise of virtue, and the highest good is that which is most self sufficient, then one virtue must be superior to the rest. It is “the virtue of the best part of us,” or that which is “thought to rule and lead us by nature” -- the “activity of contemplation.” (X.vi.1177912-18)

For contemplation is at once the highest form of activity (since the intellect is the highest thing in us, and the objects with which the intellect deals are the highest things that can be known) and also it is the most continuous, for we can reflect more continuously than we can carry on any form of action . . . Also the activity of contemplation will be found to possess in the highest degree the quality that is termed self sufficiency . . . Also the activity of contemplation may be held to be the only activity that is loved for its own sake. (X.vi.1177a20-1177b5)

Contemplation, in being the most continuous and self-sufficient virtue, bears the closest resemblance to the idea of the good. Thus, it is prior to the other virtues, just as

the unmoved mover is prior to all else in creation. But there are a number of other virtues which must be perfected before one is capable of contemplation. All virtues may be classified as either intellectual or moral. Moral virtue “is a certain ‘habit’ or state of the will; it is a fixed disposition to observe the mean -- to feel or do not too much and not too little -- in the various departments of conduct.”<sup>14</sup> Moral virtue predisposes us, as far as possible, to live according to reason, which belongs to the realm of intellectual virtue.

Just as the human soul is divided into the intellectual and moral virtues, so the intellectual virtues consist of two separate faculties:

There are two rational faculties, one whereby we contemplate those things whose first principles are invariable, and one whereby we contemplate those things which admit of variation . . . These two rational faculties may be designated the Scientific Faculty and the Calculative Faculty respectively; since calculation is the same as deliberation, and deliberation is never exercised about things that are invariable.  
(VI.i.1139a5-14)

The calculative faculty, consisting of art and prudence, may be thought of as the lower echelon of intellectual virtue, since it concerns things which vary, rather than things which are eternal and unchanging. Art admits of variation since it involves “bringing something new into existence,” a thing which may “either exist or not.”(VI.iii.1140a12-13) Prudence concerns the actions which occur in the contingent realm of human choice, also admits of variation. Thus, prudence rules the lower echelon of intellectual virtue -- “namely, the part that forms opinions; for opinion deals with that which can vary, and so does prudence.” (VI.v.1140b25-27)

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14. Rackham, Introduction, xxii.

The scientific faculty may be considered the “higher” area of intellectual virtue, since it concerns those things which do not vary, but are eternal, which Aristotle refers to as “first principles:”

We all conceive that a thing which we know scientifically cannot vary . . . . An object of Scientific Knowledge, therefore, exists of necessity. It is therefore eternal, for everything existing of absolute necessity is eternal; and what is eternal does not come into existence or perish . . . . All Scientific Knowledge can be communicated by teaching, and . . . what is scientifically known must be learnt. But all teaching starts from facts previously known . . . since it proceeds either by way of induction, or else by way of deduction. Now induction supplies a first principle or universal, deduction works *from* universals; therefore, there are first principles from which deduction starts, which cannot be proved by deduction; therefore they are reached by induction. (VI.iii.2-4)

The first principles are therefore the point from which all other knowledge must take its bearing:

The first principles from which scientific truths are derived cannot themselves be reached by Science; nor yet are they apprehended by Art, nor by Prudence. To be a matter of Scientific Knowledge a truth must be demonstrated by deduction from other truths; while Art and Prudence are concerned only with things that admit of variation. Nor is Wisdom the knowledge of first principles either: for the philosopher has to arrive at some things by demonstration. (VI.v.8.vi.).

Intelligence is that by which we apprehend first principles, so it may be considered to occupy the highest tier of the scientific faculty. It is what the philosopher Josef Pieper has described as “insight,” most akin in its operation to the ability to see.<sup>15</sup> Aristotle explains that “intelligence apprehends definitions which cannot be proved by reasoning. (VI.viii.9) Scientific knowledge involves conclusions which follow “of

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15. Pieper, Josef, *Happiness and Contemplation*, trans. Richard and Clara Winston (South Bend, Indiana: St. Augustine’s Press: 1998),77-79.

necessity.” Wisdom, occupying the middle rung of the ladder, is the ability to comprehend both the first principles and the conclusion (scientific knowledge) that follow from them. It is, in a sense, the proper direction of intelligence; it is the knowledge of the first principles themselves and the awareness of their application to everything else that can be known:

Wisdom must be the most perfect of the modes of knowledge. The wise man therefore must not only know the conclusions that follow from his first principles, but also have a true conception of those principles themselves. Hence Wisdom must be a combination of intelligence and scientific knowledge; it must be a consummate knowledge of the most exalted objects. (VI.vii.1141a15-20)

Although Aristotle is probably quoted most often in his assertion that “man is a political animal,” we see in his discussion of the intellectual virtues that Aristotle, no less than Plato, believes that man must unite as far as possible with the eternal truth grasped by the intellect. Like Plato, he believes the best human life to be that of the philosopher:

If then the intellect is something divine in comparison with man, so is the life of the intellect divine in comparison with human life . . . we ought so far as possible to achieve immortality, and do all that man may to live in accordance with the highest thing in him . . . it may even be held that this is the true self of each, inasmuch as it is the dominant and better part. (X.vii.1177b30-1178a2)

But according to Aristotle, the supremely happy life is exceedingly rare, since “not in virtue of his humanity will the man achieve it, but in virtue of something within him that is divine.” Nevertheless, man must aspire to the philosophic life much as Plato’s regime must aspire to the “pattern laid out in the heavens.” But to a much greater degree than Plato, Aristotle recognizes the limits of our ability to live a purely



philosophic life; for as humans, we are a composites of body and soul, and therefore even the most philosophic one among us does not possess a “nature self sufficient for the activity of contemplation.” X.vii.1178b35) This is why Aristotle devotes so much effort to explaining “the life of moral virtue,” which affords a “secondary degree” of happiness. (X.viii.1178a9) Moral virtue, which is directed by prudence, regulates nearly every aspect of human life, including our passions and our interactions with others.(X.viii.1178a10-20)<sup>16</sup>

Although Aristotle defines wisdom as a higher good, he sets it aside to focus mostly on prudence, which, in regulating our interaction with others, is more closely related to the political life. In this way, we may say that Aristotle devotes much more of his teaching to understanding practical matters. But we have noted Aristotle’s

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16. We might say that Aristotle’s discussion of moral virtue stands as a subtle criticism to the regime of Plato’s *Laws*. For although that regime focused on the ordinary citizens, and thus was about education in moral, versus intellectual virtue, we find that the citizens of the *Laws* are not even truly morally virtuous, given the definition that Aristotle provides. For Plato’s regime precludes the free will necessary for true virtue. Aristotle notes: “As some people, we maintain, perform just acts and yet are not just men (for instance, those who do what the law enjoins but do it unwillingly, or in ignorance, or for some ulterior object, and not for the sake of the actions themselves, although they are as a matter of fact doing what they ought to do and all that a good man should), on the other hand, it appears, there is a state of mind in which a man may do these various acts with the result that he really is a good man: I mean when he does them from choice, and for the sake of the acts themselves...for deductive inferences about matters of conduct always have a major premise of the form “Since the end or supreme good is so and so”....but the supreme good only appears good to the good man: vice perverts the mind and causes it to hold false views about the first principles of conduct. Hence it is clear that we cannot be prudent without being good.” (VI.xii.1144a15-37) Just as Plato equates justice with the Good, Aristotle, in keeping with his grounded vision of human possibility, calls justice “perfect virtue,” since it is moral virtue “displayed toward others.” (V.i.1129b26) Just as true virtue is achieved through actions freely done, true justice is achieved not simply when the law is obeyed, but when it is obeyed from one’s conscious choice: “Men suppose it requires no special wisdom to know what is just and what is unjust, because it is not difficult to understand the things about which the law pronounces. But the actions prescribed by law are only accidentally just actions. *How* an action must be performed, *how* a distribution must be made to be a just action or a just distribution -- to know this is a harder task than to know what medical treatment will produce health.” (V.ix.1137a10-15) The actions prescribed by law are only “accidentally just” because true virtue is practiced voluntarily, and not out of fear of punishment; true virtue is practiced for its own sake, and the people who do so do not need the law to make them good. Thus, human laws may point us in the right direction, and may certainly protect us from the worst types of injustice, but mere obedience to the law does not fulfill the requirement for the highest human life.

ranking of the intellectual virtues to emphasize that although he sets his gaze on the “human” things, Aristotle never wavers from the belief that the human things are intrinsically connected to the “divine.” Human things may vary over time, but this does not change the fact that the prudence by which we govern our affairs is ultimately subordinate to a single, unchanging reality. For prudence involves not just the calculation of what is advantageous for oneself in a given situation, “but what is advantageous as a means to the good life in general.” (VI.v.1140a25-27)<sup>17</sup>

Not every kind of correctness in deliberation . . . constitutes deliberative excellence. A man of deficient self-restraint or a bad man may as a result of calculation arrive at the object he proposes as the right thing to do, so that he will have deliberated correctly, although he will have gained something extremely evil; whereas to have deliberated well is felt to be a good thing . . . (furthermore) one may arrive at what is the right thing to do, but not arrive at it on the right grounds, but by means of a wrong middle term. This quality then, which leads one to arrive at the right conclusion, but not on the right grounds, is still not deliberative excellence. (VI.ix.1143b17-20)

It would seem that modern philosophy has adopted half of Aristotle’s teaching. For, especially in Locke, it focuses on prudence, defined as the rational attainment of one’s ends -- but without grounding those ends in any higher reality. The fulfillment of human nature is deliberation, and the sign of deliberating well is the attainment of one’s desires. Political science then comes to be seen as the ultimate fulfillment of all human need as if prudence were an end in itself. This is certainly the lesson of Machiavelli and his philosophical heirs. Aristotle himself best sums up the contrast between his own view and that of modernity:

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17. In contrast to Socrates, who noted that prudence is a faculty which can be equally used for good or ill, Aristotle is careful to emphasize that prudence, being essential to the function of man, achieves its proper end only when directed toward the achievement of the good.

It is absurd to think that Political Science or Prudence is the loftiest kind of knowledge, inasmuch as man is not the highest thing in the world . . . It is also clear that Wisdom cannot be the same thing as Political Science, for if we are to call knowledge of our own interest wisdom, there will be a number of different kinds of wisdom. (VI.vii.1114b30-32)

So despite his famous maxim that “man is a political animal,” Aristotle does not identify politics as man’s highest pursuit, because political actions are never ends in themselves. In fact, politics can be detrimental to the life of true virtue, because it is often pursued simply as a means to winning honor:

But honor after all seems too superficial to the good for which we are seeking, since it appears to depend on those who confer it more than on him upon whom it is conferred, whereas we instinctively feel that the good must be something proper to its possessor and not easy to be taken away from him. (I.v.1095b 23-25)

If man’s purpose is to live, as far as possible, according to the “divine” aspect of his nature, then the political life can never fulfill the highest aspirations of human beings. In fact, Aristotle holds that we are much more inclined toward family and private associations, for “man is by nature a pairing creature even more than he is a political creature, inasmuch as the family is an earlier and more fundamental institution than the state.”(VIII.xii.15-20) In *The Laws*, Plato assumed that the life of moral virtue was attained through wholehearted dedication to the life of the polis. Aristotle recognizes that moral virtue is best attained through personal relationships, and that this in turn benefits the state, for “friendship appears to be the bond of the state; and lawgivers seem to set more store by it than they do by justice, for to promote concord,

which seems akin to friendship, is their chief aim.” Indeed, “the highest form of justice seems to have an element of friendly feeling in it.” (VIII.i.20-25)

But as in Plato, there seems to be an interdependent relationship between the individual good and the good of the state. The tension in Aristotle derives from the fact that our desire to participate in political institutions does not correspond to our need for them. Nevertheless, Aristotle, no less than Plato, believes politics to be a necessary means to happiness, for we require a good political structure to help us order the various competing human inclinations.<sup>18</sup> Although private activity may be preferable, good politics is still necessary. As noted in the *Politics*, “When he has reached his *telos* the human being is the best of animals, but when apart from *nomos* and justice, the worst.” (1.1253a31-33)<sup>19</sup>

Politics structures human life not so much through our activity in its institutions, but through the presence of laws, since “it is difficult to obtain a right education in virtue from youth up without being brought up under right laws.” (*Ethics*, X.ix.1179b34) If we consider Aristotle’s assertion that rationality is the highest virtue of human beings, and that we should strive for this insofar as is possible, it is easy to see how politics is part of the human good. “We need to live in cities, not as an end in itself or as a perfect expression of our humanness, but because it is generally the case

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18. See Salkever, Stephen G., *Finding the Mean: Theory and Practice in Aristotelian Political Philosophy*, (Princeton: Princeton University Press, 1990), pp. 74-82.

19. See also Salkever, p. 77: “Human beings are uniquely capable of, *and uniquely in need of*, a reasonable perception of their interest, and such a perception (and therefore a good life) is somehow dependent upon the presence of *nomoi*...The political life thus understood appears neither as the peak of human excellence nor as a strategy for protecting individual rights or powers. Perhaps the best way to characterize it in modern terms would be to say that it answers to the human need for authority, for a structure of reasonable prejudice to support and sustain good ways of life.”

that by living according to reasonable laws and customs we can develop and support our biologically inherited potentiality for living rationally.”<sup>20</sup>

In fact, one of the most important roles of the political structure is in promoting the inclination toward family and friendship, for to the extent that the law fails to educate in moral virtue, Aristotle notes, “it would seem to be the duty of the individual to assist his own children and friends to attain virtue.” (X.ix.1180a33 Thus, there is a certain interdependence between the family and the political structure. For the family supplies a positive contribution to moral education, and also checks against an excessive attachment to political affairs, which tends to feed a love of victory, crowding out the virtues of rationality and moderation.<sup>21</sup>

The reality of political life is complex. For while we may be rational, we are not perfectly so; and while we may be sociable, the community we live in does not define us as individuals. Therefore, if the political realm is to educate citizens in virtue, it must support the unique personal relationships where virtue is cultivated in the first

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20. Salkever, p. 180.

21. See Salkever, p. 191: “Family life...prepares us for the public life by establishing a rationalizing sense of shame, and at the same time it provides a separate focus of attention and care-- a real job to do-- which can check the danger of excessive civic - mindedness that seems always to threaten to turn the most tightly knit cities into armed camps. It is thus desirable that a certain tension be maintained between public and private.” Richard Mulgan also writes that the *Ethics* “supports a mixed ideal, with philosophy as the best activity but leaving room for statesmanship and citizenship if the opportunity arises as part of the social life of the *polis*,” and that Aristotle’s ethical treatises attack not the political life, but rather, the vices that often accompany unmoderated political activity, such as the “glorification of warfare and the pursuit of despotic or imperial power.” “Aristotle and the Value of Political Participation,” *Political Theory* 18 (1990), pp. 208-209.

place.<sup>22</sup> Politics, then, is not an end in itself, but rather, an “umbrella” under which the life of moral virtue is lived. Thus, Aristotle is like Plato in his supposition that the first principles, which are the object of contemplation, are the ultimate purpose of human thought and action. But unlike Plato, Aristotle is content to remain in the cave -- for the cave is the realm of moral virtue, which marks the highest life most people will achieve. Nevertheless, it is in the recognition that we *are* still in the cave that meaningful action can take place. We might say that in contrast to Plato’s philosopher king, who rules in a top-heavy manner (reshaping society back to the pure form of its origin by force-feeding public life), Aristotle’s approach is from the bottom up -- getting politics to cultivate the personal relationships through which we might privately ascend to the divine.

### **The Philosophic First Things in the Light of Christianity<sup>23</sup>**

It may be argued that Plato and Aristotle took reason as far as it could possibly go in understanding the meaning of human existence, and yet, it was not far enough.

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22. Salkever, 244. Mulgan also notes “The argument that man is a political animal does not imply that man must participate in politics to become virtuous, only that he must literally be a part of a *polis* and live under its laws. Political institutions have an ethical function in moral education of the individual, but it is primarily through the coercive authority they impose rather than through any opportunity for active political participation,” p. 205.

23. Two points must be stressed at the beginning of this section. I have not treated Stoicism because in its fundamental aim of achieving complete detachment from the both the good and bad aspects of life, it in some ways comes closer to Eastern mysticism than Western philosophy, and therefore lacks a certain relevance to question of truth and politics as I am pursuing it. Furthermore, the Stoic doctrine of predestination meant that to live “according to nature” was both “descriptive and normative. ‘Nature embraces both the way things are and the way they should be.’” (See Weinreb, pp. 36-37). As Stoicism sees God as immanent in all material reality and that the only act whereby the individual unites with God is to allow fate to take its course, it does not fit neatly into the continuity between the outlooks of the Greeks and Christianity as I see them. Also, it should be noted that the view of Christianity presented in this section is specifically Catholic Christianity. It was this type of Christianity (as opposed to the revealed law of other religious traditions like Judaism and Islam) against which modernity rebelled, and later “Christian” doctrines of natural law seem to me to be intrinsically connected with the very modern philosophy I am critiquing. .

Plato correctly discerned that the search for happiness could never rest in political life, yet his solution seemed wholly unsatisfactory: not only in way the regimes proposed in the *Republic* and the *Laws* diminished the importance of particular relationships (especially family) to happiness, but also in the supposition that the good life was the preserve of a very small minority -- the philosophers. It seems hard to escape the conclusion that for Plato, the vast majority of humanity serves no other purpose than to make philosophic life possible for the few. Aristotle, on the other hand, understood the importance of particular relationships -- especially those existing in families and among friends -- and moral virtue in contributing to a happy life. But like Plato, he still believed that the highest human life was that of philosophy. Thus, both Plato and Aristotle taught that uniting with truth was the highest and most important human endeavor -- but the exact nature of truth was not known.

Christianity forever altered the relationship between truth and politics. In Christianity, truth is transcendent, but no longer unknown; its nature is revealed for all to see. God is not a remote unmoved mover or abstract force of intelligence, but rather, a loving father. In fact, we might say that Christianity produced two major innovations: in the requirements for the best human life, and in the meaning of wisdom. This instituted a radical equality across the board, eradicating what was (for the ancients) the necessary tension between philosophy and politics. Let us see how this was done.

For the ancients, the highest human life was that which sought wisdom; it was the life lived for truth. Christianity, too, holds that the highest human life is that lived

for truth, but truth is now understood as God, and one need not be a philosopher to know him. In the words of one of the twentieth century's most prolific Christian philosophers, John Paul II:

In dismantling barriers of race, social status and gender, Christianity proclaimed from the first the equality of all men and women before God. One prime implication of this touched the theme of truth. The elitism that had characterized the ancients' search for truth was clearly abandoned. Since access to the truth enables access to God, it must be denied to none. There are many paths which lead to truth, but since Christian truth has a salvific value, any one of these may be taken, as long as it leads to the final goal, that is, to the revelation of Jesus Christ.<sup>24</sup>

The radical equality of Christianity is not that which marks modern philosophy, in which all are held to be equally base. It is rather in the recognition that although there is one *telos*, a single end, for human beings, it may be reached through a number of different paths, among which philosophy is but one option.<sup>25</sup>

So Christianity posits that there are as many different insights on the same truth as there are individuals. But the fact that everyone has access to truth in no way diminishes the importance of philosophy, for revelation must always be reasonable, and all Christians are called to know God at the highest level of which they are capable. For some, this will be philosophy; for others, something different. Christianity does not

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24. John Paul II, *Fides Et Ratio: On the Relationship between Faith and Reason*, (Boston: Pauline Books and Media), 1998, pp. 51-52.

25. See 1 Cor. 12.4-12: "There are different kinds of spiritual gifts but the same Spirit; there are different forms of service but the same Lord; there are different workings but the same God who produces all of them in everyone. To each individual the manifestation of the Spirit is given for some benefit. To one is given through the Spirit the expression of wisdom; to another the expression of knowledge according to the same Spirit; to another faith by the same Spirit; to another gifts of healing by the one Spirit; to another mighty deeds; to another prophecy; to another discernment of spirits; to another varieties of tongues. But one and the same Spirit produces all of these, distributing them individually to each person as he wishes.



nullify the real differences between people, but stipulates the equality of all at the most fundamental level: Everyone, philosopher and non-philosopher alike, is capable of leading a fully human life. The ancients had taught that the moral virtue cultivated in particular relationships disposed one's soul, as far as possible, to intellectual virtue -- the highest virtue attainable by human beings. Christianity holds that the highest human life is not a single pattern to which only the most intellectually adept can conform. Rather, the highest human life is the highest life attainable for each individual. Both intellectual and moral virtue are equal paths to the same end. Unlike classical philosophy, Christianity posits that truth is accessible to everyone -- it is not an esoteric club, but rather a vast, open wilderness to be explored by all, with as many particular treasures to be found in it as there are individuals.

Prior to Christianity, love of wisdom demarcated the essential difference between the philosopher and the non-philosopher; it also underscored the tension between living the highest human life and establishing the conditions to make such a life possible. Christianity, in positing a human end that did not distinguish between philosopher and common man, solved the social problem, for loving truth now *necessarily* required loving others:

The nature of the bond that unites the Christian to his fellow men undergoes a profound transformation. Between the love of truth and the requirements of a life wholly dedicated to its pursuit on the one hand and the service of one's fellows on the other, there can no longer be any final

opposition. Christian wisdom or the knowledge of the divine truth is not only reconcilable with but inseparable from the love of neighbor.<sup>26</sup>

Prior to Christianity, loving truth meant loving universal, abstract *concepts*.

Now, the love of truth included the love of particular persons as well. The logical explanation for this lies in the revelation that God is no remote or disinterested force, but has created the entire universe and has an ongoing interest in its existence, taking stock of even the hairs on our heads.<sup>27</sup> Now, to unite us with truth is to make ourselves like it. For the ancients, this meant to philosophize -- since pure intelligence seemed to be the primary principle governing the universe. Philosophy was the highest form of love, because only it was loved for its own sake and was therefore free of the inherent selfishness that taints all other forms of human love. Human beings were free to the degree that their passions were ruled by reason, just as the lower elements were ruled by the higher in the order of nature.

Christianity, too, holds that living the highest human life requires moderating the passions. But through revelation we realize that man possesses not just a natural end, but also a supernatural end, which is to attain final, eternal union with God. We move closer to this end to the degree that we are able to unite ourselves to God in life, which is to act in the image of God. But what does this mean? Well, the fundamental relationship between God and the universe is that of Creator to created. God, who is

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26. Fortin, Ernest, "Political Idealism and Christianity," in *Classical Christianity and the Political Order: Reflections on the Theological-Political Order*, J. Brian Benestad, ed. (Lanham, Maryland: Rowman & Littlefield), 1996, pp. 43-44). See also John Paul II: "Without love of neighbor, made concrete in keeping the commandments, genuine love for God is not possible." *Veritatis Splendor* (Boston: Pauline Books), 1993, p. 26.

27. See Matt 10:29-32.

bound by no necessity, creates freely. And if all things are contained in God, then the act of creation is an act of giving. God imparts little bits of himself into all of creation, but to human beings gives the most significant part -- reason and free will. So we act as images of God when we freely give ourselves as gifts to one another -- that is, when we love one another. Even the nature of revelation itself confirms God's primary role as one of giving:

The truth made known to us by revelation is neither the product nor the consummation of an argument devised by human reason. It appears instead as something gratuitous, which itself stirs thought and seeks acceptance as an expression of love. This revealed truth is set within our history as an anticipation of that ultimate and definitive vision of God that is reserved for those who believe in him and seek him with a sincere heart. The ultimate purpose of personal existence, then, is the theme of philosophy and theology alike. For all their difference of method and content, both disciplines point to that "path of life" which, as faith tells us, leads in the end to the full and lasting joy of the contemplation of the Triune God.<sup>28</sup>

To imitate God, then, is to love; real love is the gift of oneself. This is not at odds with the idea of philosophy, for we might say that even philosophy is the product of giving; for once thoughts are shared, they no longer belong solely to oneself. Every act of conversation involves a certain letting go. *Logos* sets humans apart from the animals by showing that reasonableness and the ability to give, the traits by which we imitate God, are the distinctly human traits.<sup>29</sup>

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28. John Paul II, *Fides Et Ratio*, pp. 26-27.

29. See John Paul II, *Mulieris Dignitatem: On the Dignity and Vocation of Women*, (Boston: Pauline Books), 1988, pp. 27-28: "The Lord Jesus, when he prayed to the Father 'that all may be one...as we are one' (Jn 17:21-22), opened up vistas closed to human reason. For he implied a *certain likeness* between the union of the divine Persons and the union of God's children in truth and charity. This likeness reveals that man, who is the only creature on earth which God willed for its own sake, cannot fully find himself except through a sincere gift of self."

Like classical philosophy, then, Christianity maintains that there is a reciprocal relationship between social life and the attainment of truth. In fact, we might say that Christianity facilitates social relations through the idea that faith is as much a defining mark of human dignity as the ability to reason. Let us see how this is done. Classical philosophy clearly posited that man, to the extent that he is fully human, is a thinking creature; that to be a human being to the highest degree is to be above all a reasoning being; that is, a being who seeks *knowledge*. Christianity concurs that man is rational, but holds that rationality is ultimately dependant on faith.

There are in the life of a human being many more truths which are simply believed than truths which are acquired by way of personal verification. Who, for instance, could assess critically the countless scientific findings upon which modern life is based? Who could personally examine the flow of information which comes day after day from all parts of the world and which is generally accepted as true? Who in the end could forge anew the paths of experience and thought which have yielded the treasures of human wisdom and religion? This means that the human being -- the one who seeks the truth -- is also the one who lives by belief.<sup>30</sup>

And *belief*, it seems, is the cement of all social life, for accepting things on faith requires trusting others. If we were not creatures who *believed* and *trusted* first of all, we would not be capable of walking out the door, getting into the car, going to the doctor or eating in a restaurant. "Belief is often humanly richer than mere evidence, because it involves an interpersonal relationship and brings into play not only a person's capacity to know but also the deeper capacity to entrust oneself to others."<sup>31</sup> All human

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30. John Paul II, *Fides Et Ratio*, 43-44.

31. *Ibid.*, 44.

relationships bear out the fact that truth is derived not *solely* by reason, but by *faith* insofar as we trust others. It is in this way that friendship nurtures reason:

It must not be forgotten that reason too needs to be sustained in all its searching by trusting dialogue and sincere friendship. A climate of suspicion and distrust, which can beset speculative research, ignores the teaching of the ancient philosophers who proposed friendship as one of the most appropriate contexts for sound philosophical enquiry.<sup>32</sup>

Just as Aristotle taught that by living with others, one learns moral virtue (the necessary ground from which to obtain intellectual virtue), Christianity teaches that living in harmony with others aids one's attainment of God. But whereas for Aristotle, human association was ultimately a means to a higher truth, for Christianity, human association, like all aspects of creation, are both a means to the truth and a reflection of it:

(In Genesis) we read that man cannot exist "alone" (cf. Gen 2:18); he can exist only as a "unity of the two," and therefore *in relation to another human person* . . . Being a person in the image and likeness of God thus also involves existing in a relationship, in relation to the other "I." This is a prelude to the definitive self-revelation of the Triune God: a living unity in the communion of the Father, Son and Holy Spirit . . . (it) shows that the creation of man is also marked by a certain likeness to the divine communion.<sup>33</sup>

Christianity, then, solved the dilemma of accepting or rejecting the cave by embracing both options. In this, it bears a certain resemblance to Aristotelian philosophy. Living in union with others would be as integral to the good life as contemplating truth. But by elevating friendship and family to the level of philosophy, Christianity obliterated what the ancients held to be the necessary relationship between

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32. Ibid., 46.

33. Ibid, pp. 25-26.

politics and human happiness. Never again would politics be the necessary gateway to achieving the highest human life.

*The City of God and the City of Man*

St. Augustine was one of the first, and most influential, thinkers to discuss Christianity and politics. He illuminates the significance of this new relationship in three ways. First, he holds, with the ancients, that politics, being worldly, is unlikely to point man to his highest aspirations, which are transcendent. Second, also with the ancients, he holds that man's final end, the City of God, should nevertheless be the pattern toward which politics must strive. Finally, in opposition to the ancients, he illustrates the point mentioned above, that there is no longer a necessary tension between politics and the highest human life.

Like the ancients, Augustine is no idealist when it comes to human nature, and therefore does not expect politics, a human invention, to be able, in and of itself, to fulfill the purpose of human existence, which is transpolitical:

Two cities have been formed, therefore, by two loves: the earthly by love of self, even to contempt of God; the heavenly by love of God, even to contempt of self. The former glories in itself, the latter in the Lord. For the one seeks glory from men; but the greatest glory of the other is God, the witness of conscience . . . And when these two cities severally achieve what they wish, they live in peace, each after its kind.<sup>34</sup>

Human nature, left to its own devices, is simply incapable of achieving anything real, lasting or true. Augustine sounds almost like Machiavelli in his assessment of

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34. Augustine, *City of God*, XIV, 28 reprinted in *St. Augustine: The Political Writings*, Henry Paolucci, ed. (Washington, D.C.: Regnery Gateway), 1962, p 8.

fallen human nature. But unlike Machiavelli, Augustine believes, with the ancients, that human nature can, and should be, improved:

Each man, being derived from a condemned stock, is first of all born of Adam evil and carnal, and becomes good and spiritual only afterwards, when he is grafted into Christ by regeneration: so was it in the human race as a whole . . . For in each individual . . . there is first of all that which is reprobate, that from which we must begin, but in which we need not necessarily remain.<sup>35</sup>

Until men learn to subject their bodies to their souls and their souls completely to God, they cannot act with true justice. Therefore, there is no true justice, properly speaking, in human society.<sup>36</sup> Here we are reminded of Plato's theory of the forms, in which any city on earth is merely an imitation of a more perfect form. Augustine also seems to be acknowledging the argument of Thrasymachus -- that human communities and laws are often formed around the interest of the stronger -- when he says that "true justice has no existence save in that republic whose founder and ruler is Christ."<sup>37</sup> But just because true justice is unlikely to be achieved on earth, Augustine does not, like Thrasymachus stop trying to reach at least a semblance of justice, for a community may also be defined as "an assemblage of reasonable beings bound together by a common agreement as to the objects of their love . . . it will be a superior people in proportion as it is bound together by higher interests, inferior in proportion as it is bound together by lower."<sup>38</sup> Augustine argues that any society, to the extent that it is to be considered

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35. *City of God*, XV,1.

36. *City of God*, XIX, 21.

37. *City of God*, II, 21.

38. *City of God*, XIX, 24.

superior, will be firmly anchored in truth -- that is, God. For virtue left so untethered will quickly degenerate into vice:

For though the soul may seem to rule the body admirably, and the reason the vices, if the soul and reason do not themselves obey God, as God has commanded them to serve Him, they have no proper authority over the body and the vices . . . It is for this reason that the virtues which it seems to itself to possess, and by which it restrains the body and the vices that it may obtain and keep what it desires, are rather vices than virtues so long as there is no reference to God in the matter.<sup>39</sup>

By stressing man's supernatural end of union with God, Christianity automatically exempts human society from being able to deliver the one thing of which human beings are most needful. Hence, as in classical philosophy, our expectations of what politics can achieve are low. Augustine warns against placing our faith in human institutions, which are inherently precarious, since everything in creation, including earth itself is finite, for "when, where, how in this life can these primary objects of nature be possessed so that they may not be assailed by unforeseen accident?"<sup>40</sup> But there is also a positive side to Christian realism, for once the political regime has been delivered from its responsibility of assuring the highest human life, it is no longer *necessarily* in tension with human ends:

The earthly city, which does not live by faith, seeks an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men's wills to attain the things which are helpful to this life. The heavenly city, or rather the part of it which sojourns on earth and lives by faith, makes use of this peace only because it must, until this mortal condition which necessitates it shall pass away. Consequently, so long as it lives like a captive and a stranger in the earthly city, though it has already received the promise of redemption, and the gift of the Spirit as the earnest of it, it makes no

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39. *City of God*, XIX, 24.

40. *City of God*, XIX, 4.



scruple to obey the laws of the earthly city, whereby the things necessary for the maintenance of this mortal life are administered; and thus, as this life is common to both cities, so there is a harmony between them in regard to what belongs to it.<sup>41</sup>

The earthly city seeks a limited, temporal peace and is therefore simply an ordering of a combination of wills. Peace is its end and highest good. For the heavenly city, peace is not an end in itself, but is rather the means to, as well as the outcome of, the union of individuals with God. Thus, the type of political regime one lives in matters not; the political regime is irrelevant to the attainment of real human happiness.

We should note that to say that truth is accessible to all is not to say that it is whatever each individual determines it to be. It is still an objective measure standing over and above all human activities and associations, including politics.<sup>42</sup> As Ernest Fortin put it, “Christianity liberates man neither by removing him from the cave nor by promising to dispel the shadows in which it is immersed but by supplying him with standards of judgment that are ultimately independent of the regime and the pervasive influence of its principles.”<sup>43</sup> The highest human good is still attained outside of politics; but is no longer dependent upon the political regime:

Christianity, as Augustine understands it, does indeed provide a solution to the problem of human society, but the solution is not one that is attained or attainable in and through human society. Like that of the

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41. *City of God*, XIX, 17.

42. See Etienne Gilson: “St. Augustine did not bequeath to his successors an ideal of a universal human city united in view of purely temporal ends proper to it; but it was enough that the City of God exist in order to inspire men with the desire to organize the earth into a single society made to the image and likeness of the heavenly city.” *Foreword*, in *St. Augustine: The City of God*, trans. Gerald G. Walsh, S.J., Demetrius B. Zema, S.J., Grace Monahan, O.S.U. and Daniel J. Honan (USA: Image Books), 1958, p. 32.

43. Fortin, “Political Idealism and Christianity,” pp. 47-48.

classical philosophers, albeit in a different way, it remains essentially transpolitical.<sup>44</sup>

The pagan philosophers held that the right kind of regime was necessary to make possible philosophy, and therefore the attainment of truth, but Christianity does not depend on political support for survival.<sup>45</sup> Therefore, the needs of the political life are not necessarily in tension with those of the city of God, since both, in their proper spheres, are legitimate. In Plato, the tension derives from the fact that it is only through the city that the philosophical life can be achieved; yet, the end of philosophical fulfillment is often at odds with that of the city. Philosophers are to reenter the cave and rule, not out of any desire to rejoin society, but simply as a survival measure -- to preserve the possibility of philosophy. Average people are merely pawns to this end, but they nevertheless benefit from having philosophical rule. In the manner of trickle-down-economics theories, philosophical activity will rain down benefits upon a multitude with which it remains essentially unconcerned. One might say, then, that in classical philosophy, the benefits to the city from philosophical activity are somewhat *accidental*. But to the degree that individuals practice Christianity, the benefits to the city are *substantial*, with peaceful social relations being not merely an effect, but an intrinsic aspect of the practice of Christianity.

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44. Fortin, Ernest, "St. Augustine," *History of Political Philosophy*, Third Edition, ed. Leo Strauss and Joseph Cropsey (Chicago: University of Chicago Press), 1987, p. 203.

45. See Ernest Fortin's description of classical philosophy: "For, if the city needs philosophy, philosophy itself needs the city. It is not a plant that grows in any soil and it requires for its nurture certain conditions that are not encountered everywhere." *Classical Christianity and the Political Order*, p. 43.

In Christianity, then, truth, being freed from the fetters of politics, assumes, more than ever before, a real sense of universality. Because the truth has been revealed apart from the political regime, it can never again be considered the preserve of any one type of regime. It speaks to individuals, rather than communities, and requires no one particular stock of people. “God’s promise in Christ now became a universal offer: no longer limited to one particular people, its language and its customs, but extended to all as a heritage from which each might freely draw.”<sup>46</sup> Augustine notes:

This heavenly city then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various these are, they all tend to one and the same end of earthly peace.<sup>47</sup>

Unlike the regime of modern universal human rights, which seeks to rework all nations through the mold of democracy, the universality of Christianity can embrace a multiplicity of regimes, for “no one culture can ever become the criterion of judgment, much less the ultimate criterion of truth with regard to God’s revelation. The Gospel is not opposed to any culture, as if in engaging a culture the Gospel would seek to strip it of its native riches and force it to adopt forms that are alien to it.”<sup>48</sup>

*St. Thomas: From Natural Right to Natural Law*

It is perhaps due to Christianity’s freedom from association with any one political regime that St. Thomas has been criticized by moderns for not being

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46. John Paul II, *Fides Et Ratio*, p. 89.

47. *City of God*, XIX, 17.

48. John Paul II, *Fides Et Ratio*, p. 91.

democratic enough. Since Chapter 4 will be devoted to the thought of St. Thomas, we will turn to him only briefly here. For now, his importance lies in the way he signals the shift from ancient natural right, which viewed truth as existent, yet unknown and perhaps unknowable, to natural law, which implies in addition a lawgiver, and a known dictate to be obeyed. Fortin again:

As a law of *nature*, the natural law shares in reason and cannot be reduced exclusively to the will of God. The actions that it commands or forbids are intrinsically good or bad; they are not good or bad simply as a result of their being commanded or forbidden by God. As a *law*, however, it also contains an explicit reference to God's will, to which it owes its moving force. It thus stands midway between the natural right doctrine of the nonreligious philosophic tradition on the one hand and the strict voluntarism of the nonphilosophic religious tradition on the other. It is distinguished from the latter in that it defines law as essentially an act of reason rather than of the will, and it differs from the former in that it conceives of God not only as the final cause of the universe or the unmoved mover who moves all things by the attraction that he exerts on them but as a lawgiver and an efficient cause who produces the world out of nothing and by his ordinances actively directs all creatures to their appointed end.<sup>49</sup>

Although Thomas believed knowledge based on revelation to be superior to unassisted reason, he never overlooked the fact that the content of revelation must always be reasonable. Indeed, among the major thinkers of the medieval period, Thomas was one of the few to hold that reason need not be in opposition to revelation. He effected "a reconciliation between the secularity of the world and the radicality of the Gospel, thus avoiding the unnatural tendency to negate the world and its values

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49. Fortin, Ernest, "St. Thomas Aquinas," *History of Political Philosophy*, p. 268.

while at the same time keeping faith with the supreme and inexorable demands of the supernatural order.”<sup>50</sup>

Leo Strauss, in a famous statement, pinned the blame for the emergence of modern political philosophy on Thomas, charging that modern natural law was in part a reaction to Thomas’s “absorption of natural law theory by theology.”<sup>51</sup> Was modernity a reaction to Thomas, necessarily, or simply to Christianity itself? Did Christianity lead philosophy astray? Perhaps modernity’s rejection of truth as a standard for politics is better explained by G.K. Chesterton, who said “The Christian ideal has not been tried and found wanting. It has been found difficult; and left untried.”<sup>52</sup>

### **Machiavelli and the Low Road to Modernity**

Chesterton’s observation would seem applicable to Machiavelli, who, clearly accepting that one cannot serve both God and Caesar, opts instead for the latter. In his claim to be pursuing the *effectual* truth, in his rejection of philosophical knowledge in favor of consequentialism, in his insistence that human nature is base and will remain so despite the noble pull of law, in his severing of the ends of politics from the ends of human beings, Machiavelli seems modern. Yet a close examination of his works leaves us wondering how new Machiavelli’s teaching is, after all. Does Machiavelli blaze any untrodden trail, or is he simply a post-Christianity Thrasymachus? Is the current crisis of meaning in human rights attributable to the thought of Machiavelli or to something different? In this section, we will examine Machiavelli’s lowering of the ends of

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50. John Paul II, *Fides Et Ratio*, p. 59.

51. Strauss, Leo, *Natural Right and History* (Chicago: University of Chicago Press), 1950, p. 164.

52. Chesterton, G.K., *What’s Wrong with the World* (Dodd, Mead and Company: 1910; reprinted by Ignatius Press), 37.

politics, and consider whether this teaching really departs from what the classical philosophers knew. We will then discuss the aspects of Machiavelli's philosophy which really are novel -- those concerning international relations.

*The Fork in the Philosophical Road*

Machiavelli undoubtedly broke from Plato and Aristotle in questioning the usefulness of a natural order to political life. Recall that in *The Republic*, knowledge of justice, and subsequently, a good political regime depends upon philosophy, which in turn depends upon subverting the base passions to the intellect. Justice in the virtuous city-- in the city which strives for the good -- is achieved by subverting the multitude to those possessing theoretical knowledge, the philosophers, for they alone can expose the shadows on the wall of the cave as mere opinions. Thus, it is presupposed that all human beings are *not* created equal, and that this makes a difference in politics.

The ancients, in striving for virtue, necessarily destroyed the notion of equality in the process; for knowledge was the only way to true virtue, and the path of philosophy was open to a precious few. Plato's best and second best regimes fail to satisfy because he never meets the pressing task of defining the purpose of existence for the many, other than to make the philosophic way of life possible for the few. Plato seemed to have taken reason as far as it could possibly go, and yet, something still seemed missing. It was as if the ancient philosophers, in their quest for the philosophic first things, were traveling along a path that forked at the dawn of Christianity, branching off into a high road (the city of God) and a low road (the city of man). One could choose the high road, and retain the ancient emphasis on objective truth, virtue

and reason. But to do this would require that one speak in Christian terms, as Thomas did, or at least tackle seriously the veracity of Christian tenets. Or one could reject Christianity altogether, and truth with it, as Machiavelli seems to have done. As we will see, the fork in the road is real enough, and Machiavelli makes a clear choice. For that reason, his words often resonate with a certain honesty. The real difficulty seems to come with Grotius and Locke, who, wanting it both ways, deny the fork exists. Talking the talk of the city of God, they walk the walk of the city of man, and as a result, miss the road entirely, leading modern philosophy into a thicket of theoretical confusion, from which it is still trying to emerge.

*The Apparent Novelty of Machiavelli: Lowering the Ends of Politics*

The first point of departure between Machiavelli and the ancients is in his explicit preference for the shadows to the light. Politics should not attempt to elevate human nature, but must rather play to its depravity. Machiavelli, having spent many hours studying classical philosophy, declares it to be useless to the real politics which constitutes life in the cave, for in setting its gaze toward the sky, it looks to ideal regimes that will never come to be:

Since my intent is to write something useful to whoever understands it, it has appeared to me more fitting to go directly to the effectual truth of the thing than to the imagination of it. And many have imagined republics and principalities that have never been seen or known to exist in truth; for it is so far from how one lives to how one should live that he who lets go of what is done for what should be done learns his ruin rather than his preservation.<sup>53</sup>

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53. Machiavelli, *The Prince*, Harvey C. Mansfield, Jr., trans. (Chicago: University of Chicago Press), 1985, Chapter XV, p. 61.

And the truth about human nature, Machiavelli argues, is that men are not prone to virtue, but are rather “ungrateful, fickle, pretenders and dissemblers, evaders of danger, eager for gain.” Politics should be guided accordingly, “For a man who wants to make a profession of good in all regards must come to ruin among so many who are not good. Hence it is necessary to a prince, if he wants to maintain himself, to learn to be able not to be good, and to use this and not use it according to necessity.”<sup>54</sup> He adds:

A prince who wants to maintain his state is often forced not to be good. For when that community of which you judge you have need to maintain yourself is corrupt, whether they are the people or the soldiers or the great, you must follow their humor to satisfy them, and then good deeds are your enemy.<sup>55</sup>

Most people are not good by nature; they are not even educable to the good. Note that Machiavelli implies here that the prince, who must learn how “not to be good,” is already virtuous on some level, and therefore superior to most people. Machiavelli observes that the kind of government the prince will have depends on the type of human material available. Aristotle said something similar, but he believed that the good ruler would raise the people to the highest level of which they were capable. For Machiavelli, the good prince molds, not the people, but *himself* and is better, or worse, depending on their character.

If classical philosophy is about truth, modern political philosophy as espoused by Machiavelli is primarily about appearances. If aspiring to higher standards does not result in actual regimes that are good, and the purpose of politics is to order human society in a way that is useful, then Machiavelli concludes that appearances are enough

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54. *The Prince*, Chapter XV, p. 61.

55. *The Prince*, Chapter XIX, p.77.



for ruling. The best princes are those who keep their word lightly; who are clever enough to outwit others, and who always overcome those who abide by honest principles:

Thus, you must know that there are two kinds of combat: one with laws, the other with force. The first is proper to man, the second to beasts; but because the first is often not enough, one must have recourse to the second. Therefore it is necessary for a prince to know well how to use the beast and the man . . . (this) means that a prince needs to know how to use both natures; and the one without the other is not lasting . . . if all men were good, this teaching would not be good; but because they are wicked and do not observe faith with you, you also do not have to observe it with them.<sup>56</sup>

The best ruler is not the one who sees beyond the cave, but rather, the master manipulator of the shadows within. Now, this is not altogether different from Aristotle's practical philosophy, or even from the Christian understandings of politics. The difference for Machiavelli is that the light outside the cave is completely irrelevant to understanding what goes on within. By favoring appearances over truth; by holding that the standard of good is not beyond the cave but only a product of the results produced inside, Machiavelli casts politics in a consequentialist mode:

Everyone sees how you appear, few touch what you are; and these few dare not oppose the opinion of many, who have the majesty of the state to defend them; and in the actions of all men, and especially of princes, where there is no court to appeal to, one looks to the end. So let a prince win and maintain his state; the means will always be judged honorable, and will be praised by everyone. For the vulgar are taken in by the appearance and the outcome of a thing.<sup>57</sup>

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56. *The Prince*, Chapter XVIII, p. 69.

57. *The Prince*, Chapter XVIII, p. 71.

If the good is measured not by an outside standard, but by results, it logically follows that the paramount virtue is one of *action*. This explains why the praise Machiavelli does extend to the ancients centers on the “spirited” pagan virtues of strength and honor. The law that was so paramount to ordering the ancient community is now replaced with power. Machiavelli thus lays the groundwork for Hobbes’s famous assertion that all law is the will of the sovereign:

The principle foundations that all states have, new ones as well as old or mixed, are good laws and good arms. And because there cannot be good laws where there are not good arms, and where there are good arms there must be good laws, I shall leave out the reasoning on laws and shall speak of arms.<sup>58</sup>

If the source of law is nothing higher than the power of the ruler, and the ruler is successful or not (that is, maintains his rule or not) based upon the results he produces, then it follows that anyone who understands how to use power is qualified to rule.

Indeed, this is what Machiavelli claims:

Thus, a prince should have no other object, nor any other thought, nor take anything else as his art but the art of war and its orders and discipline; for that is the only art which is of concern to one who commands . . . For there is no proportion between one who is armed and one who is unarmed, and it is not reasonable that whoever is armed obey willingly whoever is unarmed, and that someone unarmed be secure among armed servants.<sup>59</sup>

Now, we have seen in Machiavelli the notion that to rule effectively, one must be either virtuous or not, depending upon the circumstance. We have seen the idea that in political life, consequentialism takes precedence over virtue, and that one who tries to

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58. *The Prince*, Chapter XII, p. 48.

59. *The Prince*, Chapter XIV, p. 58.

be good among so many who are depraved will never succeed. But does this make Machiavelli's teaching *new*?

*The Subtle Similarities Between Machiavelli and the Ancients*

When we revisit *The Republic*, we find that Machiavelli seems to be nothing more than a latter-day Thrasymachus. Recall our discussion of Book I of *The Republic* (pages 6-7). Thrasymachus, defining justice as the will of the stronger, contrasts it with "true" justice, thus demonstrating that he is still operating in the same moral universe as Socrates. Now recall Machiavelli's scathing assessment of human nature, and his insistence that the prince, living among so many who "are not good," also learn "how not to be good." Like Thrasymachus, Machiavelli holds that moral goodness and worldly success do not necessarily go together. And like Thrasymachus, he prefers success to virtue. Like Thrasymachus (see p. 7), he argues that in an evil world, the game is won not by those who are perfectly just, but by those who can be perfectly unjust:

Such (unjust) methods are exceedingly cruel, and are repugnant to any community, not only to a Christian one, but to any composed of men. It behoves, therefore, every man to shun them, and to prefer rather to live as a private citizen than as a king with such ruination of men to his score. None the less, for the sort of man who is unwilling to take up this first course of well doing, it is expedient, should he wish to hold what he has, to enter on the path of wrong doing. Actually, however, most men prefer to steer a middle course, which is very harmful; for they know not how to be wholly good nor yet wholly bad.<sup>60</sup>

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60. Machiavelli, *The Discourses*, ed. Bernard Crick, trans. Leslie J. Walker, S.J. (England: Penguin Books, 1983), I.26.

So we see that Machiavelli's teaching on human nature marks no real innovation from former opinions. Like Thrasymachus, he proposes to discuss justice "in his own words." Like Thrasymachus, he argues only for the definition of justice on the level of the city<sup>61</sup>, and like Thrasymachus, claims that this is the will of the stronger (hence, all the instructions about maintaining one's power). Like Thrasymachus, he believes that it is better to be "wholly bad" than just slightly so; and like Thrasymachus, he says that those who are "truly" good necessarily come to ruin among so many who are not; the "truly" good are simply high minded simpletons who quickly drown in the sea of politics. Machiavelli seems, too, to realize the folly in trying to obliterate the distinction between the bad simply and the good simply. If not, he would probably speak of individuals not as evil and wretched, but rather, as Hobbes later would, simple matter in motion.

Furthermore, Machiavelli's teaching on equality is not far removed from Plato's; for he clearly believes that the prince must be superior to the multitude. Remember that in supposing that the prince must sometimes learn how "not to be good," in order to deal with the people on their own level, Machiavelli has implied that the prince already possesses more virtue than the public. Like Plato, he views religion as a necessary tool for coercing the multitude into obedience -- to do the things that prudent men understand by reason alone.<sup>62</sup> Plato and Aristotle, recognizing that the ability to philosophize existed in man by virtue of something "divine," knew the

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61. For more on the ways that Thrasymachus resembles the city see Leo Strauss, *The City and Man* (Chicago: University of Chicago Press, 1964), p. 78.

62. See *The Discourses*, I.11.

marriage of philosophy and politics depended upon chance. For Machiavelli, who is concerned only with the animal nature of man, chance is less formidable; indeed, as we will see below, conquering *fortuna* is simply a matter of controlling human events. Thus, he is confident that the prince will be able to conquer chance.<sup>63</sup> Both Plato and Machiavelli suppose that prudence is attainable by the few alone.<sup>64</sup> Both believe that only the few are deserving of the really good things in life, while the masses, like cattle, require not happiness, but contentment. Indeed, Machiavelli's writings indicate that if the mass of humanity is lowly, he himself is not. In a letter to Francesco Vittori, Machiavelli describes life on his farm. After a day of working and mulling about at the inn, he retires to his study:

I enter the ancient courts of ancient men, where, received by them with affection, I feed on that food which only is mine and which I was born for, where I am not ashamed to speak with them and to ask them the reason for their actions; and they in their kindness answer me; and for four hours of a time I do not feel boredom, I am not frightened by death; entirely I give myself over to them . . . And because Dante says it does not produce knowledge when we hear but do not remember, I have noted everything in their conversation which has profited me, and have composed a little work *On Princedoms* . . .<sup>65</sup>

There is one final important similarity between Machiavelli and Plato: both the prince and the philosopher king are, in different ways, dependent upon the support of

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63. See *Discourses*, pp. II.30: "For where men have but little virtue, fortune makes a great display of its power; and, since fortune changes, republics and governments frequently change; and will go on changing till someone comes along, so imbued with the love of antiquity that he regulates things in such a fashion that fortune does not every time the sun turns around get a chance of showing what it can do." See also *The Prince* Chapter XXV.

64. In *The Laws*, Plato teaches that true prudence is an act of discernment -- locating the gentle pull of truth, which is like a fine thread. (Book I, 644e-645b) For Machiavelli, it is overstatement -- being bold enough to aim higher than is necessary (*Prince*, p. 22).

65. *The Letters of Machiavelli*, edited and translated by Allan Gilbert (Chicago: University of Chicago Press, 1961), p. 142.

the people; the philosopher king, for survival, and the prince, for existence itself. Socrates takes it for granted that the philosopher king will be ridiculed or killed by the ignorant masses who are blinded by the light of truth. Nevertheless, the philosopher must make the risky descent into the cave, not out of genuine concern for the public, but in order to make the philosophic life possible. Philosophy promises a life far superior to politics, but it still requires the right type of political regime to survive -- much as the mind, to survive, must be housed in a healthy body. Machiavelli's prince needs the people as well, but for a different reason. He cannot be a ruler in the absence of subjects, because his power is based not on an external standard, but upon his ability to work with what is in front of him. He is not as self-sufficient as the philosopher, but is rather a master craftsman who derives his identity from what he *does*. He is less an embodied soul than the muscle of a limb.

For this reason, the prince must retain the support of the people, even if through deceit, for he is nothing without them. This is why he should, above all "think how to avoid those things that make him hateful and contemptible."<sup>66</sup> The prince need not be loved, but must always strive to avoid hatred:

The best fortress there is, is not to be hated by the people, because although you may have fortresses, if the people hold you in hatred fortresses will not save you; for to peoples who have taken up arms foreigners will never be lacking to come to their aid.<sup>67</sup>

So given Machiavelli's restatement of the position of Thrasymachus, his agreement with Plato and Aristotle about the basic inequality of all men, and his

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66. *The Prince*, Chapter XIX, p. 72.

67. *The Prince*, Chapter XX, p. 87.

acknowledgment that the best men are in some sense dependant upon the approval of the multitude, in what way is his teaching “wholly new?”

*Machiavelli's New Ground*

It may be simply in the unstated recognition of the fork in the philosophical road created by Christianity. Machiavelli says that he has “decided to enter upon a new way, as yet untrodden by anyone else.”<sup>68</sup> If there was indeed a new way to go, it may have been due less to Machiavelli’s own innovation than to the fact that Christianity, for the reasons stated above, presented a “wholly new” way of looking at the world, with which all previous opinions must reckon. Plato’s Socrates had supposed that what was true for the individual was true for the city; that we could use the teaching on individual virtue to make the city itself virtuous. Christianity showed that individuals and cities differ not only in number, but in *kind* -- that there is no necessary unity between the souls of individuals and the “souls” of cities. Indeed, the good of one’s soul is often in opposition to the demands of politics, and living in a good city is only accidental to being a good individual. Plato saw an analogy between the city and the soul; Christianity taught that the city of man and the city of God were alike only by the coincidence that the former was populated solely by members of the latter. The city as such could not possess a soul, only a number of individual souls. Both the earthly and the heavenly cities had a proper function in their own realm. But like Plato, Christian philosophy stressed the importance of the city of God -- the “pattern laid out in the heavens,” in Plato’s words -- for guiding life in the city of man; the good life below was

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68. *The Discourses*, Preface to Book I.

attainable only insofar as one strove for the higher good. Machiavelli accepted the division between the two cities and chose to live solely according to the city of man. He made the political realm an entity unto itself, where different rules apply.

In this context, then, it may be significant that all of Machiavelli's teachings revolve around the notion of maintaining the stability of the state. Indeed, in *The Discourses*, his chief indictment of the Church itself is that it has attempted to occupy both the heavenly and earthly realms, thus placing Italy in danger of foreign domination:

The Church, then, has neither been able to occupy the whole of Italy, nor has it allowed anyone else to occupy it. Consequently, it has been the cause why Italy has never come under one head, but has been under many princes and *signori*, by whom such disunion and such weakness has been brought about, that it has now become the prey, not only of barbarian potentates, but of anyone who attacks it. For which our Italians have to thank the Church, and nobody else.<sup>69</sup>

Machiavelli finds pagan religion, in contrast to Christianity, much more conducive to fostering the fierce nationalism that inspires men to die for country. "For our religion, having taught us the truth and the true way of life, leads us to ascribe less esteem to worldly honor."<sup>70</sup> In comparing the effect of Christianity on the state with that of pagan religions he says:

To begin with, compare the magnificence of their sacrifices with the humility that characterizes ours. The ceremonial in ours is delicate rather than imposing, and there is no display of ferocity or courage . . . the old religion did not beatify men unless they were replete with worldly glory . . . Our religion has glorified humble and contemplative men, rather than men of action. It has assigned as man's highest good humility, abnegation and contempt for mundane things, whereas the

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69. *The Discourses*, I.12.

70. *The Discourses*, II.2.



other identified it with magnanimity, bodily strength, and everything else that conduces to make men very bold. And, if our religion demands that in you there be strength, what it asks for is strength to suffer rather than strength to do bold things . . . This pattern of life, therefore, appears to have made the world weak, and to have handed it over as a prey to the wicked, who run it successfully and securely since they are well aware that the generality of men, with paradise for their goal, consider how best to bear, rather than how best to avenge, their injuries.<sup>71</sup>

Christianity, in turning man's focus inward to the soul, is a poor bedfellow for politics, which is mostly concerned with the acquisition of worldly goods. Machiavelli laments the fact that Christian martyrs gladly march to their deaths for God, but not for their country. Although he correctly presumes that Christianity in itself does not require pacificism, there does not seem to be much beyond this with which to reconcile Christianity to Machiavelli's political vision. Indeed, Chapters 15 and 18 of *The Prince* deal extensively with the idea that the good of the soul is pursued only at one's own political expense.

So Machiavelli's focus is not the prince's soul, but his survival. And this is always tied directly to the survival of the state against the threat of foreign domination:

For a prince should have two fears: one within, on account of his subjects; the other outside, on account of external powers. From the latter one is defended with good arms and good friends; and if one has good arms, one will always have good friends. And things inside will always remain steady, if things outside are steady . . . but, as to subjects, when things outside are not moving, one has to fear that they may be conspiring secretly. From this, the prince may secure himself sufficiently if he avoids being hated or despised and keeps the people satisfied with him.<sup>72</sup>

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71. *The Discourses*, II.2.

72. *The Prince*, Chapter XIX, pp. 72-73.

Thus, for Machiavelli, the new political morality is to be dictated by international relations. In insisting that the regime look outward, to its own survival, rather than inward, to the souls of its citizens, he not only departs from Plato in demonstrating that the political regime is a wholly different entity than the individual, but also lays the foundation for liberalism. For classical liberalism, too, is concerned not so much with the inner morality of the individual as with his bodily survival in a hostile world.

The idea of politics as international relations finds further confirmation in Machiavelli's teaching on *fortuna* in *The Prince*. For if politics is to be understood as preserving the survival of the state above all, and the international realm is, in liberal terms, a war of all against all, then indeed the only necessary virtues are those relating to war. And to be bold and strong is to make things happen, as opposed to letting them happen. It also means to be alone in the world, depending on nobody and nothing but oneself.<sup>73</sup> It is only with the pagan virtues of strength and boldness that princes can control the destiny of their state:

Many have held and hold the opinion that wordly things are so governed by fortune and by God, that men cannot correct them with their prudence, indeed that they have no remedy at all; and on account of this they might judge that one need not sweat much over things but let oneself be governed by chance . . . Nonetheless, in order that our free will not be eliminated, I judge that it might be true that fortune is arbiter of half of our actions, but also that she leaves the other half, or close to it, for us to govern . . . When fortune varies and men remain obstinate in their modes, men are prosperous while they are in accord, and as they

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73. See *The Prince*, Chapter XXIV, p. 97: "For one should never fall in the belief you can find someone to pick you up. Whether it does not happen or happens, it is not security for you, because that defense was base and did not depend on you. And those defenses alone are good, are certain, and are lasting, that depend on you yourself and on your virtue."

come into discord, unprosperous. I judge this indeed, that it is better to be impetuous than cautious, because fortune is a woman; and it is necessary, if one wants to hold her down, to beat her and strike her down. And one sees that she lets herself be won more by the impetuous than by those who proceed coldly.<sup>74</sup>

It is interesting to note that Machiavelli begins Chapter XXV by wondering whether *worldly* things are governed by God and Fortune, but then drops all mention of God to explain that men must conquer Fortuna. This leaves the impression that Machiavelli is using “worldly” here in the same sense that he does in *The Discourses*, where he contrasts “worldly honor” with the “truth” and “true way of life” of the heavenly city.<sup>75</sup> If this is so, then the exhortation to conquer Fortuna would be in keeping with all the aspects of Machiavelli’s teaching we have explored heretofore: that politics should be wholly focused on and pursued by means of the secular, and should remain forever divorced from all notions of the city of God. For Machiavelli, God, existing in the realm of the supernatural, does not pertain to the particular, earthly ends of politics. He crowns Fortuna queen of the earthly city. Fortuna can be conquered because human beings can always exert control over political events, which are, after all, composed of human actions; they cannot exert control over God. Just as one gains entry to the heavenly city by molding his soul to the unchanging reality of God, in secular politics, Machiavelli believes, one alters individual actions in response to the changing winds of human acts and opinions. Of course, the very idea that there can be any real division between man’s ultimate end and his actions is highly problematic, casting doubt over Machiavelli’s true motives in mentioning God. But

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74. *The Prince*, Chapter XXV, pp. 98-101.

75. *The Discourses*, II.2.

then, a serious reader of Machiavelli is unlikely to believe that his teachings are in any way compatible with Christianity.

This becomes even more clear in the final chapter of *The Prince*, where Machiavelli pleads to Lorenzo to liberate Italy from her oppressors:

One may see how she prays God to send her someone to redeem her from these barbarous cruelties and insults . . . Nor may one see at present anyone in whom she can hope more than in your illustrious house, which with its fortune and virtue, supported by God and by the Church of which it is now prince, can put itself at the head of its redemption . . . the sea has opened; a cloud has escorted you along the way; the stone has poured forth water; here manna has rained; everything has concurred in your greatness. The remainder you must do yourself. God does not want to do everything, so as not to take free will from us and that part of the glory that falls to us.<sup>76</sup>

By describing a military and political challenge through the use of biblical imagery, Machiavelli is again leading the way to an understanding of politics on the level of international relations -- that is, state centered. The one in need of a redeemer is not mankind, but the state itself. Redemption is not the eternal salvation of a soul, but the earthly survival of a nation. The new redemption issues not from God, for the purpose of a transcendent standard or end, but from a man, for the purpose of the willful control of human events. Given everything we have learned from Machiavelli thus far, including the fact that he views religion primarily as a means of inspiring men to fight for their country, we might consider that his use of biblical language here is not so much to imply that God himself sanctions any means for the liberation of Italy, but rather to illustrate the new understanding of politics -- the path of the low road, on

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76. *The Prince*, Chapter XXVI, pp. 102-103.

which man himself becomes king of the earthly city. Although Machiavelli opts for the low road, he seems to have grappled more seriously with the political implications of Christianity than have his successors. Clearly, Machiavelli has made his choice -- “better to reign in hell, then serve in heaven.” We now turn to Grotius to learn how modern philosophy responded to that choice.

### **Chapter 3: The Decline of Truth and the Rise of Rights in the Thought of Grotius and Locke**

*It makes all the difference in the world whether we put truth in the first place, or in the second place.*

– John Morley

The last chapter traced the changing relationship of principle to politics from Plato to Machiavelli. It found that the Christian vision of human beings as created in the image and likeness of God, and the resulting disjunction between the city of God and the city of man denied both the ancient idea of the fundamental inequality of all and its insistence that truth and politics were co-dependent, albeit in tension. Machiavelli seemed to accept the gulf between the heavenly and earthly cities, but opted for rule in the city of man. The essential truthfulness that we detected in Machiavelli was in his recognition that Christianity is often at odds with political success. Machiavelli seemed to say that one could choose to be “truly” good and expect to fail politically, or win the game at the risk of one’s soul. Regardless of Machiavelli’s personal views on the ultimate existence of God, any reader, casual or careful, is unlikely to derive from him the conclusion that Christian virtue and political success are compatible. In this way, we might say that Machiavelli maintains the classical and Christian distinction between politics and soul.

Machiavelli had rejected the ancient and Christian emphasis on an objective moral order. Hugo Grotius (1583-1645), partly in response to this view, wrote *The Law*

*of War and Peace* (1625) which offers a new theory of natural law that in effect proposes a marriage between the heavenly and earthly cities. The ultimate success of such an attempt might be judged by the fact that this work, which earned Grotius the title of “Father of International Law,” is believed to have “furnished the intellectual foundation” for the Treaty of Westphalia, which closed the Thirty Years War in 1648 by the creation of a system of independent states, in which national sovereignty is the ultimate standard of justice.<sup>1</sup> In other words, it is Grotius, the theologian, who provides the grounds for positivism, a doctrine which heralds legal right over moral right, and which, to this day, is the chief philosophical rival to the idea of natural law. In this section, we will examine the ways that Grotius’ new natural law actually contributed to political philosophy’s rejection of first principles, most evident in the writings of John Locke. Through his implicit denial of original sin, Grotius looks to will, rather than truth, as the chief human end, and thereby significantly alters the traditional understanding of natural law.

### **Grotius: Answering the Machiavellian Challenge**

*The Law of War and Peace* consists of a Prolegomena, and three parts. Book I describes the law of nature, defined as the normal state of relations between human beings. It is devoted to understanding what human beings are naturally like in interaction with each other. Given the premises laid in Book I, Grotius seeks in Book II to determine the cause of conflict between human beings -- that is, the origins of war.

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1. Dumbauld, Edward, “Editor’s Introduction,” in Grotius, Hugo *Prolegomena to the Law of War and Peace*, trans. Francis W. Kelsey (Indianapolis, IN: Bobbs-Merrill Company, Inc., 1957), p. xiv.

Book III deals exclusively with war itself, and the questions of how human beings should conduct themselves within a war -- the concept of *jus in bellum*.

In the Prolegomena, Grotius sets out the major premise of the work. There he explains that his task is to defend the idea of natural law against the views of certain “realists” who maintain that all talk of such a law is folly:

Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. On the lips of men quite generally is the saying of Euphemus, which Thucydides quotes, that in the case of a king or imperial city nothing is unjust which is expedient. Of like implication is the statement that for those whom fortune favors might makes right, and that the administration of a state cannot be carried on without injustice. (Proleg. 9)<sup>2</sup>

Grotius sets out, then, to provide a new answer to the age old charge that justice is the interest of the stronger. Despite the clear and more recent statement of this position by Machiavelli, Grotius never mentions him by name, perhaps because Machiavelli’s own writings present too clearly the lack of fit between the heavenly and earthly cities, an observation which we shall find to be evidently against Grotius’s

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2. Grotius, Hugo, *De Jure Belli Ac Pacis Libri Tres* (1625). *Classics of International Law*, 3, James Brown Scott, general ed. 2 vols. Vol. 2, English Text, translated by Francis W. Kelsey et al. (Oxford: Clarendon Press, 1925).



goals.<sup>3</sup> Instead, Grotius chooses an ancient figure, Carneades, as the best representative of the view he will refute:

Carneades, then, having undertaken to hold a brief against justice, in particular against that phase of justice with which we are concerned, was able to muster no argument stronger than this, that, for reasons of expediency, men imposed upon themselves laws, which vary according to customs, and among the same peoples often undergo changes as times change; moreover that there is no law of nature, because all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves; that, consequently, there is no justice, or if such there be, it is supreme folly, since one does violence to his own interests if he consults the advantage of others. (Proleg.5)

The challenge Grotius hopes to answer, then is no small one: it is Machiavelli's (unacknowledged) view that the idea of an objective moral law is at odds with the "real" world, where all creatures are selfish *by nature*, and that any pursuit of a notion of the common good is therefore antithetical to one's own good. This has serious ramifications for both the idea of law itself and for international law. For if law finds its source in convention rather than nature, it imposes no real obligation absent a sanction that makes obedience more advantageous than disobedience. But of course, Carneades

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3. See Thomas L. Pangle and Peter J. Ahrensdoerf, *Justice Among Nations: On the Moral Basis of Power and Peace* (Lawrence, Kansas: University of Kansas Press, 1999), p. 168. See also Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994), p. 127. Zuckert notes that "Machiavelli and others in Grotius's day doubted the very existence of the law Grotius sought to treat; more than that, they held that there is no *jus naturale*. The greatest deficiency of the natural law tradition, Grotius says, is that it has failed to convince the scoffers; he must revise the tradition not only because he seeks to treat more adequately a relatively undeveloped branch of law, but more fundamentally because the tradition has hitherto failed to meet the challenge of men like Machiavelli. The full blown adumbration of the natural law theory within Christendom has not made these "hard-nosed" men any more believers in natural law than were their pagan predecessors millennia ago." Zuckert does not acknowledge, however, that Christian philosophers would never suppose that they *could*, on exclusively rational terms, convince men like Machiavelli, who prefer to dwell in the city of man.

would argue, there are no real sanctions in the international sphere, so there is not, properly speaking, international law.<sup>4</sup>

In response to this challenge, Grotius sets out to “improve” the doctrine of natural law, assuming that a realist like Machiavelli rejects traditional natural law theory because it, rather than he, lacks something. It is from this standpoint that Grotius radically alters natural law theory. In this section, we will find that Grotius effects this innovation through a subtle denial of the biblical idea of fallen human nature. This leads him to alter Thomistic natural law substantially, resulting in a far more subjective understanding of right than that found in either the Christian or classical teaching.

#### *The Response to the Realists: The Denial of Fallen Nature*

As mentioned above, the charge Grotius must meet is the assertion that human relations are driven by selfishness and power. Grotius denies that man, seeking his own good, does so to the detriment of society. Rather, he insists that “among the traits characteristic of man is an impelling desire for society -- that is, for the social life -- not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind.”(Proleg. 6)<sup>5</sup> In fact, Grotius cites the example of children as proof that the social instinct is innate -- for “in children, even before their training has begun, some disposition to do good to others appears . . . sympathy for others comes out spontaneously at that age.” (Proleg.7) This may be true, but it is also true that in children, selfishness is as prominent a sentiment as sympathy,

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4. See Zuckert, p. 128.

5. This is essentially the Stoic doctrine. See Zuckert, p. 136.

and probably stronger. Augustine, writing many years before Grotius, said that “if babies are innocent, it is not for lack of will to do harm, but for lack of strength.”<sup>6</sup> Indeed, Augustine holds that due to original sin, no person is ever entirely free of guilt, or at least, the proclivity to sin.<sup>7</sup> Augustine knew that children, like adults, are inherently self-centered. To say that every man is impelled to live peacefully with others may be true, but it does not provide a full picture of human nature. After all, Augustine notes, even an evil man seeks peace -- but on his own terms. What is important for us to remember is that Grotius, in describing men as *essentially* altruistic, appears to be speaking of men, not as they should be, but as they are in fact. If this is true, then in a very subtle way, Grotius has begun to dismantle the traditional Christian understanding of human nature as fallen, crippled by original sin, and in need of grace in order to overcome itself and fulfill the purpose of its creation.

Grotius makes abundant reference to Scripture throughout the *Law of War and Peace*, and it is in these references that we sometimes see most clearly his rejection of the biblical view of human origin. Now, as we have seen, Grotius holds that the fundamental trait of man, along with his reason, is his sociability. Thus, the natural law is ingrained in man’s very constitution. “For the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of society, is the mother of the law of nature.” (Proleg. 16) Human nature, in other words, is more inclined to peace than to conflict. In addition, through divine laws, “God has made those

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6. Augustine, *Confessions*, trans. R.S. Pine-Coffin (England: Penguin Books, 1961), I.7.

7. See Augustine, *Confessions*, I.7: “If I was born in sin and guilt was with me already when my mother conceived me, where, I ask you, Lord, where or when was I, your servant, ever innocent?”

fundamental traits” of human nature -- that is, sociability -- “more manifest,” for “he has forbidden us to yield to impulses drawing us in opposite directions -- affecting now our own interest, now the interest of others -- in an effort to control more effectively our violent impulses and to restrain them within proper limits.” (Proleg.13) Grotius seems to be saying that divine law *reinforces* the fundamental traits of reason and sociability -- it makes them “more manifest” or more obvious. If human beings need only a reminder to be good, as opposed to a strict enjoinder against doing evil, it would follow that human nature is essentially in harmony with its purpose. But just the opposite, one might note, the need for a Decalogue, as well as the events preceding its presentation, shows that human nature is *not* what it is supposed to be.<sup>8</sup> Far from confirming that we are fundamentally peace-seeking and rational, the need for divine law indicates that we are prone to selfishness.

A more blatant discrepancy between Grotius’s depiction of human nature and the traditional Christian understanding occurs in his examination of the origin of ownership. There he presents a novel reading of the Book of Genesis, which further underscores his ultimate emphasis on human will and earthly peace over the will of God and absolute truth.

Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature . . . In consequence, each man could at once take whatever he wished for his own needs and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership . . . This primitive state might have lasted if men had continued in great simplicity, or had lived on terms of mutual affection such as rarely appears . . . Evidence showing the

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8. See Exodus 32. See also the Noahidic commandments of Genesis 9.

simplicity of the state of the first men who were created is to be found in their nakedness. Among them there was ignorance of vices rather than knowledge of virtue . . . Men did not, however, continue to live this simple and innocent life, but turned their thoughts to various kinds of knowledge, the symbol for which was the tree of knowledge of good and evil, that is, a knowledge of the things of which it is possible to make at times a good use, at times a bad use. (II.2.2.1-2)

One might inquire about the necessity of consulting Scripture for the origin of civil society, since traditional Christianity holds that the story of Genesis is not necessarily literally true, but represents the way man has fallen from God's grace. But since Grotius has chosen to invoke it to describe man's origins, we should meet him on his own terms. Genesis says that in the beginning, man was in harmony with God. God gave him stewardship of the garden of Eden, which was a land of plenty. The fall of man -- that is, his estrangement from God -- occurs through eating of the tree of knowledge of good and evil. Man falls, not through the pursuit of knowledge, but through the attempt to become like God by becoming the arbiter of truth. He falls through a refusal to be subject to the order of creation<sup>9</sup>.

Grotius emphasizes that in the beginning men were in harmony *with each other*. They lived simply, and there was plenty for all. Then men learned about good and evil, defined as knowledge of how to *use* things, or to be "crafty." Men created "various inventions devised for the advantage of life." The cultivation of various arts for survival, such as agriculture and grazing, brought with it rivalry arising "from the difference in pursuits," and from this came violence and greed. (II.ii.2) So it is not through attempting equality with God, but rather through the use of his (presumably)

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9. See Genesis.2-3

God-given talents that man falls. Interestingly, Grotius supposes the initial peace would have lasted had men “lived simply” or in terms of “mutual affection” that “rarely appears.”

Apart from the fact that this contradicts his earlier description of men as being inclined to natural harmony, there is another problem. For Grotius, living simply does not mean living with just the bare necessities of life, but rather in a state of uncultivated reason. The first men he describes, lacking all knowledge of virtue and vice, sound very much like the noble savage Rousseau will write about later. As in Rousseau “mutual affection” among men is apparently contingent upon uncultivated reason. Man’s fall occurs not through attempting to be the arbiter of objective truth, but through using his reason to develop the tools for survival. Man’s rational nature, therefore, would seem to be in conflict with his social nature. But this is at odds with the law of nature as Grotius describes it, which stipulates that men are reasonable *and* peace seeking. Thus, for Grotius, the fall is so inevitable that we might as well consider man’s fallen state to be his natural state. But God, the author of nature, cannot contradict the natural law. This must mean, then, that God *intended* for man to live in the natural-as fallen-state. Human nature is the way God wills it to be.(Proleg.12) If so, then Grotius has eradicated the tension between the “is” and the “ought” which has presumably plagued the natural law tradition heretofore. Natural law is how things *are*, not how they *should* be. Indeed, his views are much more in keeping with social

contract philosophy than with Christian philosophy, a point that will be more clear when we discuss Locke.<sup>10</sup>

In the new formulation, then, natural law is less an overarching guide for human beings, or an inner tug toward the dictates of conscience, than it is a *description* of human nature as it is.<sup>11</sup> And since Grotius has implied that man's primary purpose is not so much union with God as union with others (i.e., peace), natural law is simply the "maintenance of the social order," that is, the preservation of this human instinct for society supported by the faculties of speech and intelligence, that "is the source of law properly so called." (Proleg. 8) Law exists not to direct, but to preserve the order already found within the nature of man:

Since over other animals man has the advantage of possessing not only a strong bent toward social life, of which we have spoken, but also a power of discrimination which enables him to decide what things are agreeable or harmful (as to both things present and things to come), and what can lead to either alternative, in such things it is meet for the nature of man, within the limitations of human intelligence, to follow the direction of a well - tempered judgment, being neither led astray by fear or the allurements of immediate pleasure, nor carried away by rash impulse. Whatever is clearly at variance with such judgment is understood to be contrary also to the law of nature, that is, to the nature of man. (Proleg.9)

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10. For further consideration of Grotius's denial of human nature as fallen, see Steven Forde, "Hugo Grotius on Ethics and War," *92 American Political Science Review* 1998, pp. 639-48. He notes that for Grotius, the law of nature is incomplete and "stands in need of supplementation, or even correction, by civilized man . . . for natural law to be relevant to civilized man, it must adapt itself to his condition. These adaptations, moreover, are triggered by human will." The very notion that the natural law is "lacking" or even "incorrect" is inherently against the doctrine of the fall, which holds that the beginning of man was not lacking, but abundant and perfect.

11. Grotius states that "I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses." (Proleg.39)

The law of nature, then, is nothing other than the description of human nature. The two most significant aspects of human nature are the social impulse and the ability of every human being to decide what is “agreeable or harmful,” -- that is, to act rationally (which, as we shall see, is not so much in keeping with ancient philosophy as it superficially appears). This is why Grotius says the *essence* of law “lies in leaving to another that which belongs to him, or in fulfilling our obligations to him” (Proleg.10) For respecting others’ property maintains sociability, while fulfilling obligations entails the act of promising -- all important for Grotius, because through promising we define ourselves as rational creatures in association with others. In keeping promises, we define ourselves as persons who make choices, and are held accountable for them.<sup>12</sup>

#### *The Departure from the Thomistic Tradition*

Because promises form the fundamental cornerstone of the law of nature, and are entirely within the realm of human will, Grotius elevates the importance of consent while diminishing the reach of the natural law. By grounding the natural law in the consensual realm of compacts and agreements, he hopes to provide a more “concrete” way of making the natural law known -- through the historical fact of actual agreements.<sup>13</sup> But in naming the *function*, or purpose, of the law as its essence, Grotius

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12. See Zuckert, p. 147: “Convention (agreement) is not contrary to nature, but it carries with it an obligation derived from nature . . . The “mother of justice” is not utility, as Carneades and others had said, but natural law, or ultimately, human nature. Compacts (mutual promises) are to be kept not solely because they are useful (presumably they are useful or else human beings would not make them), but because they are genuinely obligatory. They are obligatory, it appears, because this kind of mutual engagement is one major mode by which human beings relate to each other socially . . . More than that, such engagement is a suitable way for rational beings to interact, for it involves the guidance of life through the exercise of reason and choice.”

13. Zuckert, p. 148.



departs from the natural law understanding of Thomas. In so doing, he effects a shift from the understanding of right as *objective*, describing the “correct” state of affairs, to *subjective*, emphasizing human will. The overall effect is to elevate human reason from a *participant* in objective truth to its *arbiter*. Let us see how this is done.

First, Grotius differs from Thomas with regard to the essence of law. Following Aristotle, Thomas held that everything could be understood according to the “four causes”: material, efficient, final, and formal. Thomas’s definition of law is “a promulgated dictate of reason for the Common Good made and promulgated by him who has the care of the community.”<sup>14</sup> (q.90a.4,c) The material cause, or the things out of which something is made, (the substance through which it exists) would be, in the case of law, the “community or human acts within society.” The efficient cause, or that which affects the final result of a thing, like a sculptor to clay or an artist to paint, is “the one who has care of the community and makes and promulgates the law” The final cause is the purpose; it is “the cause that contributes to the effect by being desired.”<sup>15</sup> In the case of law, the final cause, or purpose, is the common good. The formal cause is the way the structure and organization of all the parts come together to make something the thing it is -- that is, what “contributes intrinsically to the effect by being in it and making it to be the kind of thing it is.” (Much as the way all the parts of a watch come together in a particular way to form a time-telling instrument, as opposed to, say, one that makes music.) The formal cause of law is “promulgated dictate of reason.”

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14. Aquinas, Thomas, *Summa Theologiae I-II*, qq. 90-97: *The Treatise on Law*, ed. R.J. Henle, S.J. (Notre Dame: University of Notre Dame Press, 1993), q. 90, a.4, c.

15. Henle, “Introduction to St. Thomas,” pp. 42-45.

The essence of law, then, the element that makes it a *law* more than any other type of thing, is that it is a *reasonable* directive that is *promulgated*, or known -- via public proclamation, or naturally, being “written on the heart.” (Q.90, a.4) For Thomas, the essence of the law, as the essence of anything, then, is in its form, for it is only through *form* that proper function is possible. Grotius, however, holds that the essence of law is in its purpose, rather than its form. And the purpose of law is to get all people to respect each other’s property and to honor their contracts. If the essence of law is in its *function*, then it is not really law unless it does what it is supposed to do -- thus, *obligation* is the most important feature of law. Grotius notes that “A rule of moral actions imposes obligation to what is right. We have need of an obligation; for counsels and instructions of every sort, which enjoin what is honourable indeed but do not impose an obligation, do not come under the term statute or law.” (I.1.9.1) Although the precepts of natural law as formerly understood may point to the good, for Grotius they do not constitute law unless they can be made strictly obligatory. “Law in the strict sense is not equivalent to distributive justice, for the latter does not impose clear obligations on specific parties.”<sup>16</sup> Zuckert notes that this effects a shift in the understanding of “right,” from objective to subjective:

Law properly so called deals only with others -- and not with their good in some abstract sense, but with what is actually theirs or concretely owed them . . . Right for Grotius is entirely ‘subjective right’ and ‘active right,’ a possession of its holder or subject, something to be exercised (or not) at the discretion of the right-holder; it is no longer objective right, a

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16. Zuckert, p. 140.

rightful state of affairs. Grotius's *jus* has become the sort of right the modern natural rights doctrine affirms.<sup>17</sup>

So the innovations that Grotius makes into natural law doctrine are first, the idea that the essence of law is in function, rather than form, and that law is therefore to be understood only in the more tangible sense of subjective right, and second, that law should deal only with the narrow sphere of commutative, as opposed to distributive, justice. There is thus a vast gulf between Grotius and Thomas, who held that "all virtuous acts belong to the natural law," since "to the natural law belongs everything to which a human being is inclined according to his nature."<sup>18</sup>

Again, for Grotius, the defining feature of natural law is that it imposes an obligation. Thomas had said that the essence of natural law was in its formal cause - that is, in its being a "promulgated dictate of reason."<sup>19</sup> Grotius is concerned not necessarily with the virtue of what the law proposes, but rather with the fact that we are *obliged* to obey it. This is why he attaches so much importance to the obligations imposed by promises. For Grotius, promising is critical to our identity as rational beings in society with others. A "perfect promise" is most conducive to this, since it "has an effect similar to alienation of ownership." (II.11.4.1) It is fully intended by the conferring parties *and* given an outward sign (usually legal force). A perfect promise is

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17. Ibid., p. 141. Zuckert further adds that although the ancients never clearly set apart objective right from subjective right, they assumed the term in the former sense. "The same is true for the Thomist natural law tradition up to but not including Suarez, who . . . identified *jus* with *facultas* -- subjective right -- in just the same way Grotius did. Nonetheless, Grotius differed from Suarez as much as from others in the Thomist tradition in insisting that *jus* so understood was the sum and substance of law properly so called. Suarez did not identify *jus* with all the law there is: he distinguished *lex* from *jus* and denominated the natural law *lex naturalis*."

18. Ibid., p. 142.

19. Henle, 45.

determined by *reason* -- and thus cannot be conferred by “madmen, idiots, and children.” It requires *understanding* -- that is, full knowledge as to what the promise entails, and *autonomy* -- to be freely delivered, without fear, which also implies having the *power* to deliver the promise.(II.11.5-8)

For Thomas, the fundamental principle of natural law was that “good is to be done, evil avoided.” This placed man squarely within a universe of objective moral polarities -- that is to say, the parameters of man’s identity and actions were set between the preexisting standards of good and evil. Man is not free to question these standards, only to direct his own actions accordingly. Free will is of course critical to human existence, but is valued more for its end (union with God) than its mere exercise.

For Grotius, the fundamental principle of natural law is that “promises must be kept,”(II.9.4) because it is through promising that we affirm our nature as he defines it. If the focus of the law of nature is peace, as opposed to truth, the “first things” are those most conducive to peace. Through promising we define ourselves as rational, autonomous beings in relation to others. Promising is so essential to defining human nature that promises must be kept even among enemies. (III.1.18) Making peace the end of natural law has the effect of elevating human reason from a *participant* in objective truth to its arbiter. Let us see how this happens.

The fact that Thomas cites the basic premise of natural law as the maxim “good must be done and evil avoided,” shows that he views human actions as conforming to natural law, rather than constituting it. Thus, he is careful to point out that the natural law exists first and foremost as part of God’s eternal plan, and thus is derived from the

eternal law -- “the supreme exemplar cause of all things in the universe and exists in the mind of God.”<sup>20</sup> Human beings grasp the natural law through “participation” in the eternal law, and thus man, as the “participating entity,” resembles “the exemplar cause,” though in “a limited, deficient or imperfect way.”<sup>21</sup> In Grotius, the emphasis is that natural law exists first, not in the mind of God, but in the mind of man, for moral baseness or necessity is determined solely on an act’s agreement with a rational nature, and *consequently* is forbidden or commanded by God. God’s forbidding or commanding seem to be almost an afterthought:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that *in consequence* (emphasis added) such an act is either forbidden or enjoined by the author of nature, God . . . The acts in regard to which such a dictate exists are, in themselves, either obligatory or not permissible, and so it is understood that necessarily they are enjoined or forbidden by God. (I.1.10.1-2)

For Thomas, the eternal law is like some deep, unfathomable well. Natural law -- or human participation in the eternal law -- is like a bucket that draws from the well, taking as much as is appropriate to its capacity and constitution. Knowledge of the bucket’s contents alone may indeed be sufficient for achieving earthly peace, but in Thomas we are ever conscious of the fact that the bucket is drawn from a larger source. Good and evil exist independent of human reason, but can nevertheless be discerned by human reason insofar as it participates in the greater reality of eternal law: “Human reason by itself is not the rule of things, but principles naturally instilled in man are

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20. Henle, “Introductory Comment to Question 91, Article 2,” p. 155.

21. *Ibid.*, p. 155.

certain general rules and measures of all things to be done by man, and of these things natural reason is the rule and measure although it is not the measure of things that come from nature.” (Q.91, a.3, r.2) The well is the only source of water, and therefore the bucket must draw from it or remain dry.

For Grotius, we might say, the bucket of natural law does not draw from the eternal well, but rather, is used to fill it. It is *in consequence* of its relation to reason that an act is either commanded or forbidden by God. Thus, it would appear that human reason determines, rather than discovers, natural right.<sup>22</sup> Again, this contrasts with Socrates, who did not suppose that natural right is ever fully known, or knowable to human beings, and with Thomas as well, who cited as the main distinction of natural law not its relationship to human reason, but rather, its relationship to the eternal law, or God’s reason. Grotius implies that human society is a product of our own free will, which is nevertheless approved by God since it is beneficial to our earthly survival. Thus, God approves what we deem necessary to our protection. In this sense, both civil law and our understanding of God’s divine will have their source in the will of man. In a very subtle way, then, Grotius no less than Machiavelli heralds the power of human

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22. We can see this principle at work in Grotius’s discussion of human society and private property. He often gives the impression that the law of nature originates in man, and is therefore approved by God, rather than the law of nature as originating in God and therefore understandable by man: “It must be noted, however, that in the first instance men joined themselves together to form a civil society not by command of God, but of their own free will, being influenced by their experience of the weakness of isolated households against attack. From this origin the civil power is derived, and so Peter calls this an ordinance of man. (I Peter, ii.13) Elsewhere, however, it is also called a divine ordinance, because God approved an institution which was beneficial to mankind. God is to be thought of as approving a human law, however, only as human and imposed after the manner of men.” (I.4.7.3) Private property provides another example of how Grotius grounds the divine will in the exercise of human reason: “It is necessary to understand, further, that the law of nature deals not only with things which are outside the domain of the human will, but with many things also which result from an act of the human will. Thus ownership, such as now obtains, was introduced by the will of man; but once introduced, the law of nature points out that it is wrong for me, against your will, to take away that which is subject to your ownership.” (I.1.10.4)

will -- but rather than supposing, like Machiavelli, that human will is necessarily in opposition to God's will, Grotius simply asserts that human will, when directed toward the health of society, is God's will. Although Grotius never explicitly denies the idea of the eternal law, his failure to mention it in any context, coupled with his heavy emphasis on human will as the source of natural law, results in an overall move toward the idea of truth as subjective, rather than objective.

### *The Political-Theological Implications of Grotius*

The Grotian approach to natural law has two significant implications for the relation of theology to politics. The first is the rejection of God as an essential component of just politics. The second is that in redirecting natural law to an inward, rather than an upward, movement, Grotius actually moves natural law further from the spirit of the ancients he hopes to emulate.

Let us begin with the former point. In relating political life to human nature, Grotius makes a sweeping alteration to Thomas's order of natural inclinations. For Thomas, the precepts of the natural law relate to three levels of inclination: An inclination to the good of self preservation which we share with all living things, an inclination to things which human nature "shares with the other animals," such as sexual intercourse and the "education of children, and the like," and finally, the inclination to that which is uniquely human -- reason. "Thus man has a natural inclination to know the truth about God, and to live in society; and in accord with this inclination all those thing which relate to it belong to the natural law."(Q.91,a.2,c.4) "Grotius's treatment of the natural law truncates it, directly retaining only the third of

Thomas's three levels as part of it, and of that third, only the part about social life.”

Thus, Grotius “balances his acceptance of a broader and more elevated notion of nature characteristic of the Thomists with a much diminished and narrowed notion of law.”<sup>23</sup>

The glaring question, then, is whether we can drop God from the equation and keep a realistic vision of sociability. In altering the existing understanding of natural law, did Grotius really point the way toward a system that was as practicable as principled? Zuckert holds that the problem with the Thomistic tradition was its inability to transform nature “into a genuine law of the sort Grotius sought.” His observations seem to offer a good encapsulation of the Grotian project, so it is worth quoting them in full:

Thomas ranked at the peak of the natural inclinations those that take their bearings from human rationality: the desire to know God and the desire for social life. Not only does he not specify how the precepts flowing from these inclinations are to relate to precepts flowing from the other inclinations, but he neglects to specify the relation between these two goals of the rational faculty. If . . . we understand the orientation to God as specifying simply the highest demands nature places on human beings, then Thomas has in effect enfranchised within his natural law the very theological-political uncertainties that racked Grotius's age. In the name of such an ordering, various natural law thinkers before Grotius had unrestrainedly urged socially unsettling practices -- for example, the assassination of “heretical” rulers -- in the name of obedience to higher precepts. Grotius's truncated natural law, absolutizing the demands of social life and of justice, placed all such counsel outside the bounds of the natural law . . . According to Grotius, nature dictates social life and social peace. Grotius (unlike Hobbes) does not deny that nature prompts to other ends as well. As a modified follower of Stoic doctrine, he can easily accept Thomas's version of the three levels of natural inclination, but only the prompting to society is to be understood as law. Social life is facilitated by the existence of definite, specifiable rights and duties. As opposed to natural goods of individuals, the duties of justice -- that is, the social duties relating to others -- require the enforcement power that

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23. Zuckert, 142-43.



attaches to law in the proper sense, for human beings are more inclined to ignore what is owed to others than what is good for themselves.<sup>24</sup>

One can think of several responses to Zuckert's concerns. The first concerns the very idea that *Thomas* has "enfranchised" metaphysics within natural law. As the inconsistencies we detect in Grotius illustrate, it is hard to imagine how one might remain faithful to Christianity without doing so. Making mention of God may indeed aggravate a "theological political" problem, but how can Christians speak intelligibly of truth in any other way? Zuckert claims that Thomas fails to explain how the desire to know God and the desire for social life are related. But the relationship between the two is firmly ensconced in the Christian tradition, in Christ's statement that the most important commands are first, to love God with all one's heart, soul and might, and *then* to love one's neighbor as oneself.<sup>25</sup> In the Christian understanding -- and Grotius continually seeks support for his arguments in the Christian tradition -- love of society is subservient to love of truth. For just as Socrates taught that man cannot properly love anything without loving truth first, Christianity holds that love of neighbor is impossible without understanding both self and other in the light of truth. To promulgate any theory of human society without reference to God would be, in a strictly Christian sense, to distort this fundamental teaching. The fact that certain individuals have abused power in the name of Christianity perverts, rather than nullifies its teachings. Finally, to say, as Grotius does, that human sociability is, in and of itself, a strong enough basis on which to formulate law provides no answer to the realists who,

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24. Ibid., p. 145.

25. See Matt 22:37-39.

backed by the power driven reality of international relations, charge that humans are more selfish than social. For without the idea of objective truth, one opinion is as valid as the next.

The overall effect of this is a natural law which draws man inward, but not with the ultimate end of transcendence. Thomas described natural law as man's participation in God's eternal law, that is, the way in which man, through reason, comes to some understanding about the order of creation. It was an upward movement; the way in which mortal man unites himself with the eternal. Grotius, in describing humanity as the "mother of nature," finds the source of natural law, not in the heavens, but on the earth, in human nature itself. The way to know the natural law, then, is to look within. But this is really no reply to the Carneades's and Machiavellis of the world who look within and find not a desire for peace, but a desire to dominate.

Although Grotius identifies rationality as part of human nature and as highly relevant to the *jus naturale*, he forbears from developing that theme in the direction Plato, Aristotle, and especially the Stoics had done. For all of those ancient thinkers, rationality pointed toward political life, but also pointed beyond it, or even against it -- toward philosophy or wisdom as the natural end of human kind.<sup>26</sup>

Thus, as Aristotelian as Grotius may seem, we should remember that for Aristotle, the significant thing about any kind of human relations -- family or friendship -- is that they enabled one to be virtuous; and to be truly virtuous was to live according to truth. But according to revelation, truth had a name -- God. So, perhaps it now seemed to Grotius that in order to remain faithful to Aristotle, who spoke in terms of

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26. Zuckert., p. 139.

truth, but not God, a Christian writer had to focus on sociability while ignoring the idea of God altogether. But does such a move bring us closer to the actual spirit of Aristotle, or further away?

The first indication of a move *away* from the ancient spirit is that Grotius seems to find the ordering principle of the universe to be *will* rather than reason. For he argues that even though what we observe about human nature and therefore, the law of nature would be true even if we were to concede “that there is no God,” it is also true that law finds its source, not only in nature, but in “the free will of God:”

But the law of nature of which we have spoken, comprising alike that which relates to the social life of man and that which is so called in a larger sense, proceeding as it does from the essential traits implanted in man, can nevertheless rightly be attributed by God because of his having willed that such traits exist in us. (Proleg.12)

Through mixing references to God with a definition of secular natural law, Grotius seems to be saying that the law of nature, based on human will, is also God’s will. So far, Grotius has found authority for God’s will not so much in the fact that it is *reasonable* as in the fact that it is God’s will. But are the things Grotius attributes to God’s will reasonable? For he claims that men are peace seeking because God willed that we should be weak, and lacking many things for life so that we might desire the help of others. “The law of nature nevertheless has the reinforcement of expediency; for the author of nature willed that as individuals we should be weak, and should lack many things needed in order to live properly, to the end that we might be the more constrained to cultivate the social life.” (Proleg.16) But if we are to turn to scripture (which Grotius cites numerous times as a source of authority) we find that man, in the beginning, was

lacking nothing necessary to life itself. Although he had need of a “suitable companion,” this was to fulfill spiritual, as opposed to survival needs.<sup>27</sup> The implications of this are twofold: First, if we are to argue that natural law simply describes human nature, it can admit of many variations. Second, if God wills that we be weak, this seems to imply that we live in society because God deprives, rather than provides.

Thus, we must question both the theological and logical plausibility of utilizing the methods of classical philosophy while divorcing it from its ends -- which are, in some ways, more compatible with traditional Christianity than Grotius’s version, which dilutes the most significant aspects of both the classical and Christian traditions. It is interesting to note that scholars, Zuckert included, tend to focus on the Stoic and Aristotelian aspects of Grotius’s thought, often virtually ignoring the significance of the fact that his work teems with references to God and Christianity. Stephen Forde, for example, writes that Grotius identifies a “pre-civil state when men lived without the benefit of government. In part because of his belief in human sociability, Grotius does not treat this state as normative.”<sup>28</sup> What Forde fails to mention is that Grotius identifies this state with the book of Genesis. But as we have seen, what he says flatly contradicts the message of Genesis. So why does he refer to the Bible at all?

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27. See John Paul II, *The Gospel of Life: Evangelium Vitae* (New York: Random House, 1995), p. 63: “How very significant is the dissatisfaction which marks man’s life in Eden as long as his sole point of reference is the world of plants and animals. (cf. *Gen 2:20*) Only the appearance of the woman, a being who is flesh of his flesh and bone of his bones (cf. *Gen 2:23*), and in whom the spirit of God the Creator is also alive, can satisfy the need for interpersonal dialogue, so vital for human existence. In the other, whether man or woman, there is a reflection of God himself, the definitive goal and fulfillment of every person.”

28. Forde, p. 640.

Zuckert and Forde, two of Grotius's most recent commentators, do an excellent job of showing Grotius's connection with Stoicism and the Roman jurists. But significantly, they virtually ignore Grotius's heavy handed reference to the God of Christianity. What are we to make of it? In one sense, Grotius may be "rebellious" against Thomas by going back to ancient philosophy, most of which seems consistent and true in its own context. The big question is whether one can really synthesize this with Christian revelation, without "baptizing" Aristotle, so to speak. Can we really go back in time, especially when biblical truths fulfilled the highest aspirations of the ancient ideas? Grotius, like Machiavelli, seems to believe that we can think about politics as if Christianity didn't exist, and that this approach would be endorsed by God. This resonates with, rather than rails against, the Machiavellian notion that God has left human beings in charge of the "worldly" things.

The classical writers saw politics as necessary on some level to man's attainment of the transcendent. Natural right was not fully known, and was perhaps unknowable, but it nevertheless provided guidelines for living well; and the only way to live well was to unite oneself to the transcendent. In Grotius's time, the transcendent took the form of revealed religion. It was, of course, a contentious time, and this undoubtedly had some effect on his thinking:

Grotius follows Cicero in separating lower and higher principles of our nature and in stipulating that the duties coming from the higher principles, sociability and rationality, are more authoritative . . . (But) for Cicero and the Stoics, who fit broadly within the Socratic tradition in classical political thought, the precepts of rational nature form the basis of a moral outlook that is highly perfectionist and culminates in the form of rational justice that cannot be fully realized in any actual political order. Grotius reinterprets natural law in such a way as to downplay if

not remove entirely the higher reaches of the classical doctrine . . . He is often seen as a forerunner if not a pioneer of modernity in the emphasis he places on rights inhering in the individual, rather than “objective right,” or justice defined with reference to some objective state of affairs.<sup>29</sup>

Grotius represents the modern attempt to seek an alternative to Thrasymachus, Machiavelli, and the general view that there can be no morality in politics. But it would seem that taking the “high road” now involves grappling with Christian principles. Grotius hopes to avoid this by relying on the pre-Christian philosophers. But they too spoke of transcendence. Socrates did not dismiss the gods of the city out of hand, but judged them by the measure of truth. But according to Christianity, God *is* truth. So it would seem that in order to contemplate the transcendent in a philosophic fashion, one must at least consider Christianity on its own merits, just as Socrates did the myths of the city. In order to avoid the whole sticky prospect, Grotius and those following him choose instead to admit half of the ancient equation: rationality and sociability, without dependence on the transcendent. In this way, Grotius, by focusing on the more “concrete” (i.e., descriptive) aspects of natural law, hopes to improve its chances of being observed.<sup>30</sup>

But by explaining God’s will solely by reference to human nature, and by basing all natural laws on this, Grotius paves the way for an “eventual untheistic theory, with man’s sociability becoming the sole premise.”<sup>31</sup> In choosing a natural law that is “easy” to follow; in dropping the nettlesome notion of God from the idea of morality, Grotius

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29. Ibid., p. 640.

30. Ibid., p. 641.

31. Tuck, Richard, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), pp. 59-60.

undermines the very notion of obligation that he wishes to make a cornerstone of natural law. As Richard Tuck notes:

He simply assumed that men want to be responsible and social beings even though they may suffer as individuals for those wants in the short term, and that the law of nature obliges them to follow their natural bent. No special explanation of why it is rational for individuals to do so seemed necessary to Grotius.<sup>32</sup>

When objective truth is dropped from the moral equation, we may admit of competing descriptions of human interaction, but we lack the basis from which to judge those interactions. This becomes evident in Grotius's treatment of international law.

#### *Grotius and International Relations*

To recap our earlier discussion, in the Prolegomena, Grotius explains the purpose of his work: to establish a new understanding of natural law; one free of theological fetters and more in the tradition of the ancient thinkers. This, Grotius believes, is the only way to answer the challenge that justice is the will of the stronger. To do this without entangling the question in theological issues, Grotius believes, requires looking at human nature as it is everywhere observed. This yields the conclusion that human beings are sociable and rational. The law of nature exists not so much as an outside measure for which human beings must strive, but rather, describes human nature and simply preserves it. In this way, Grotius can describe law as it is, rather than as it should be. The main problem we have noted with Grotius's thought

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32. Ibid., p. 68. Tuck further notes that "it is not *conceptually* possible to envisage a rational social being to whom the laws of nature do not apply. The Protestants were right to be worried by this, however, for it undeniably limited the point of talking about God in a moral context. Given the natural facts about men, the laws of nature followed by (allegedly) strict entailment without any mediating premisses about God's will (though his will might still be an explanation of those natural facts). ( p. 76-77)

thus far is the way in which he attempts to make this theory compatible with Christianity. He defines man's purpose, not as union with God, but as union with fellow man -- that is, peaceful coexistence. Grotius's attempt to separate principle from practice results in both moral and theoretical confusion. But this is certainly not his aim. Indeed, he hopes to distinguish clearly between natural and positive law, and thus, like Machiavelli, to strike out on new philosophical ground:

Many heretofore have purposed to give this subject a well-ordered presentation; no one has succeeded. And in fact such a result cannot be accomplished unless -- a point which until now has not been sufficiently kept in view -- those elements which come from positive law are properly separated from those which arise from nature. For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment. (Proleg.30)

The key to understanding law, then, is to separate its natural and positive components clearly:

When many at different times and in different places affirm the same thing as certain, that ought to be referred to a universal cause; and this cause, in the lines of inquiry which we are following, must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature, the latter to the law of nations . . . For whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man. (Proleg.40)

In Book I, Grotius applies the principles attributed to human nature as explained in the Prolegomena to the sphere of international politics, and the relations of nations.

In particular, he seeks to apply his analysis of the relationship between natural and



positive law to understanding the interactions of nations. For our purposes, we shall concentrate most heavily on Book I and the first part of Book II.<sup>33</sup>

Grotius begins Book I by noting that just as the purpose of law is to preserve the peace toward which human beings naturally tend, the purpose of war is to preserve the peace between nations:

War . . . is undertaken in order to secure peace, and there is no controversy which may not give rise to war. In undertaking to treat the law of war, therefore, it will be in order to treat such controversies, of any and every kind, as are likely to arise. War itself will finally conduct us to peace as its ultimate goal. (Book I.I)

International society is an arena of perpetual war and threat of war. If the society of nations is to be considered lawful, then war must be marked by the same justice that marks civil society.<sup>34</sup> Indeed, war is the primary means by which nations strive for peace:

(War is) not a contest but a condition; thus war is the condition of those contending by force, viewed simply as such. This general definition includes all the classes of wars which it will hereafter be necessary to discuss. For I do not exclude private war, since in fact it is more ancient than public war and has, incontestably, the same nature as public war; wherefore both should be designated by one and the same term . . . the origin of the word, moreover, is not inconsistent with this use. For *bellum*, 'war', comes from the old word *duellum* . . . (which) bears to *duo*, 'two', a relation in sense similar to that which we have in mind when we call peace 'union'. (Book I.i.2 )

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33. It should be noted that the Kelsay translation uses the terms "law" and "law of nature" where Campbell has translated "rights" or "right." So in Kelsay, for example, the title of the book is "The *Law* of War and Peace," whereas in Campbell it is "The *Rights* of War and Peace." The Latin title, *De Jure Belli Ac Pacis Libri Tres* seems to point to the use of right (*jure*) rather than law (*lex*). But for our purposes, the distinction does not matter since both "natural right" and "natural law" point to the existence of transcendent truth.

34. See Pangle and Ahrens Dorf, p. 169.

Just as Socrates tries to explain the just man by reference to the just city in the *Republic*, Grotius here draws a similar analogy between the relations among individuals and the relations among nations. Grotius then says that the purpose of law on the state level -- to supply the deficiency in which each of us lives on our own -- is the same as that of the law of nations: "Just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states." (Proleg.17) Like the natural law, the law of nations as Grotius describes it is both desirable and necessary. So far, international law for Grotius is civil law writ large. (See Proleg.17-22)

After having expounded a theory of human nature in the Prolegomena and drawing the connection between human relations and international relations, Grotius in Book I goes on to ask whether war can be just -- injustice being defined as anything "in conflict with the nature of society of beings endowed with reason." (I.3.1 34) What is "lawful," in war is what is just. Grotius goes on to explain other types of rights -- such as those belonging to persons -- *facultas* -- out of which flow ownership and contractual rights (I.5-6).

By arguing that the true is identified by the rational, Grotius can segue into the conclusion that we can know the rational by observing the practice of humankind, "concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among

all those that are more advanced in civilization.” (I.1.12.1 42) The law of nature, then, may be found in the customary law of nations. But this seems to contradict his earlier statement in Prolegomena 30 and 40, where he claims that the law of nations is *different* from the law of nature. There he distinguished the common practice of nations from the natural law, which is supposedly rooted in clearly deducible rational principles., But how does the “common belief” of nations differ from their common consent?

So to recap the first chapter of Book 1, we may say that it begins with the assertion that nations, like human beings, seek peace. All war is undertaken for the sake of peace. To determine what the law of war should be, we must first ask what war is. It is, Grotius replies, simply the ordinary state of relations among nations, as well as a particular battle. War, like politics, is just insofar as it is conducive to the peaceful and rational nature of man. In Chapter 2, Grotius looks more specifically at the question of whether war conforms to the law of nature, and finds that it does, since the aim of war is “the preservation of life and limb, and the keeping or acquiring of things useful to life,” and also since right reason prohibits “only that use of force which is in conflict with society, that is which attempts to take away the rights of another. For society has in view this object, that through community of resource and effort each individual be safeguarded in the possession of what belongs to him.” (I.2.4-5 52-53)

So far, Grotius has attempted to claim that the law of nature is simply evident in our observation of mankind and of nations. By grounding his theory in simple observations, he believes he has avoided traditional natural law’s disjunction between principle and practice. But as we shall see, Grotius’s further observations of

international relations only serve to undermine, rather than support this theory. To begin with, recall the importance Grotius attaches to promising, noting that “nothing is so in accord with the law of nature” and “so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another.” (II.11.1.4) As we noted earlier, the maxim that “promises must be kept” is essential to the entire Grotian scheme of natural law and human society.<sup>35</sup>

But especially in war, enemies often do not keep promises, driven as they are by national interest rather than principles of morality. If promising is critical to the existence of the law of nature, Grotius has not bridged the *ought* and the *is*. Thus he notes that sometimes “something is said to be permissible, not because it can be done without violence to right conduct and rules of duty, but because among men it is not liable to punishment . . . in this sense we often see what is permitted contrasted with what is right.” (III.iv.2-3 642) The law of nations, or customary law, regarding conduct in warfare is concerned not necessarily with what is “right” but what is “lawful.”:

It is permitted to harm an enemy, both in his person and in his property; that is, it is permissible not merely for him who wages war for a just cause, and who injures within that limit, a permission which we said at the beginning of this book was granted by the law of nature, but for either side indiscriminately . . . As a consequence, he who happens to be caught in another’s territory cannot for that reason be punished as a murderer or a thief, and war cannot be waged upon him by another on the pretext of such an act. With this meaning we read in Sallust: ‘To whom in the hour of victory all things were permitted by the law of war.’ (III.4.3)

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35. Pangle and Ahrens Dorf argue that Grotius’s prohibition of deceit between nations as a fundamental principle to be upheld at all costs plants him firmly within the Thomist camp. (See p. 174) This may be true, to a degree. But one should bear in mind that Grotius’s disdain of lying stems not primarily from its being an offense against God, but rather, in the way that it violates the fundamental directive of Grotius’s natural law, that promises should be kept.

In other words, it is “permissible,” or “legal,” in warfare for combatants to do anything whatsoever to each other, including killing any foreigner who is in one’s territory (III.4.6,7), as well as killing women, children, prisoners of war and surrendering enemies. (III.4.9,10.11.12) In war, then, all is “permitted:”

The reason why such effects met with the approval of nations was this. To undertake to decide regarding the justice of a war between two peoples had been dangerous for other peoples, who were on this account involved in a foreign war . . . it was not within the province of their judgment or their power to determine which party had the juster cause. Furthermore, even in a lawful war, from external indications it can hardly be adequately known what is the just limit of self-defense, of recovering what is one’s own, or of inflicting punishments; in consequence it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgements of others. (III.4.3-4 643-44)

Part of the reason for maintaining an absolute sovereignty of states not subject to the scrutiny of outsiders is that outsiders are not qualified to judge the limits of what is necessary to nations in war. *Jus in bello*, then, is subjective. In a way, Grotius is arguing here that war, once entered, must allow both parties a wide degree of freedom; it must allow them to determine for themselves what shall be permissible. Once a nation has “defined” itself and its position with regard to another nation through a “promise” of declared war, its actions are beyond the scrutiny of other nations. In this way, we see Grotius’s account of nations as a prelude to liberal theory. For liberalism similarly holds that once an individual defines himself through reasoned choice, there

can be no further question of the morality of his actions. In this sense, the principles that drive liberalism are born out of the observance of the law of nations.<sup>36</sup>

But then, after explaining that in the conduct of war, virtually all behaviors are legal, Grotius goes on to qualify this statement, noting that morality forbids most of the actions the law of nations would seem to allow:

I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them. For when I first set out to explain this part of the law of nations, I bore witness that many things are said to be 'lawful' or 'permissible' for the reason that they are done with impunity, in part because coercive tribunals lend to them their authority; thing which, nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called, or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men. (III.10.1.1 716)

Thus, Grotius argues that "if the cause of a war should be unjust, even if the war should have been undertaken in a lawful way, all acts which arise therefrom are unjust from the point of view of moral injustice . . . In consequence the persons who knowingly performs such acts, or co-operate in them, are to be considered of the number of those who cannot reach the Kingdom of Heaven without repentance."(III.10.) He looks to Scripture to determine what morality requires:

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36. Stephen Forde notes that by making the concept of permission "central" to the law of nations and the law of war, Grotius replaces the more transcendent doctrine of just war with the more concrete, codified idea of legal war: "As Grotius points out, both sides in a war typically claim to be in the right. It is often difficult for third parties to make an independent judgment on the matter, and it is always dangerous to act on it. As a result, the law of nations has decreed that both combatants will be extended belligerent rights...Furthermore, the outcome of the struggle, whatever it may be, will be accorded legitimacy under the same minimal restrictions. For the ideal of just war, the law of nations has substituted the institution of legal war . . . Peace itself requires the abandonment of just-war doctrine. If rigorously applied, this doctrine would occasion endless disputes over the validity of past victories or defeats, the legitimacy of existing boundaries, the proper extent of damages or reparations . . . By sanctioning the new status quo, the law of nations at least gets closure at the end of wars. Just war doctrine could lead in practice to results the opposite of those it presumably intends." (P. 645)

The New Testament I use in order to explain -- and this cannot be learned from any other source -- what is permissible to Christians. This, however, contrary to the practice of most men, I have distinguished from the law of nature, considering it as certain that in that most holy law a greater degree of moral perfection is enjoined upon us than the law of nature, alone and by itself, would require. (Proleg.50)

Just as Socrates, in Book X of the *Republic* justifies morality not by reason, but by faith, Grotius must do the same. But the problem is that Grotius, unlike the ancient and medieval thinkers, has untethered natural right/natural law from the disjunction between the ought and the is. In the end, this only makes him inconsistent; for he described the law of nature as the way human beings *are*; but his discussion of war makes it obvious that the law of nations (or the practice of the vast majority of states) is at odds with this. First, Grotius claims that the law of nature is observed through the customary practice of nations. Then he says that the practice of nations is often at odds with natural law. He then adds that nations must therefore appeal to a higher morality. But on Grotius's own formulation, there is not really any higher morality than that of his truncated natural law. For throughout much of the work, he has implied that his natural law is in perfect harmony with Christianity. In so doing, he has emasculated Christianity, and it is a little late in the game to now expect it to engender fruitful moral discourse. As Zuckert argues, "Grotius appears able, at best, to generate a hypothetical obligation: to live according to one's nature, one ought to obey the natural law. But where is the obligation to live according to nature?"<sup>37</sup> If objective truth can be

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37. Zuckert, p. 191.

determined by sole reference to human will and reason, then, this has not been demonstrated.

But the inconsistencies are problematic only insofar as we suppose that human nature and the state are the same. Grotius tries to discuss the proper interaction of states by reference to the proper interaction among humans, and the latter by reference to human nature in general.<sup>38</sup> His observations about human nature seem inadequate; his observations about international politics do not. Thus, it may be the case that Grotius reinterprets natural law with the ultimate aim of creating something applicable to the law of nations. And indeed, if it is really he who sows the first seeds of liberalism, this may be why we find liberalism more appropriate to describing *international* society. For it is only on the international level that one may consistently posit that self interest, will, and peace trump questions of truth -- because a state in relation with other states, unlike a human being in relation with others, is not an individual with a soul, whose life points beyond itself, but rather, an organization existing solely for the protection of the individuals within.

Human law cannot command what natural law forbids or forbid what that law commands. It may permit injustice but not command it . . . The permissions of the law of war are much more devastating, violating some of the most basic restrictions of natural law, but the pressures under which it operates are correspondingly more severe . . . Grotius is of the belief that throwing up a utopian ideal for international behavior as pacifism or just-war doctrine do, is not the way to gain (moral) progress. He believes we must grant the law of nations legitimacy as a genuine form of law, despite its moral flaws. We may, we must, point out those

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38. See Richard Tuck: "The rights enjoyed by the atomic individuals in the Grotian state of nature filled out the moral world: the state possessed no rights which those individuals had not formerly possessed, and was the same kind of moral entity as them." *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), p. 63



flaws and hold up to the nations a higher moral standard rooted in natural law and the virtues. But until the community of nations comes around to such a standard, we must realize that the law of nations is the only effective systems of norms we have in international politics.<sup>39</sup>

Basically, with regard to international politics, Grotius has described what the existing conditions are, and noted that they are legal. He then wants to say that although they are legal, they are not necessarily moral. But he cannot really appeal to the morality of nations, for on his own formulation, natural law has been stripped of all real obligation. Grotius may be right in describing the dynamics of international politics, but on his own grounds, has no solid basis from which to appeal to morality.

### **Locke's Natural Law: The Answer to Grotius' Prayer**

Grotius answered the realist challenge by severing the natural law's intrinsic connection with objective truth. John Locke levels an implicit critique of the Grotian project in his *Questions Concerning the Law of Nature*, offering what appears to be a much more traditional explanation of natural law. But a closer look at the *Questions* reveals that he, no less than Grotius, undermines the idea of a providential God or nature that the natural law tradition had traditionally presumed. Locke's *Questions* intentionally teeters on a shaky theology that finally crumbles under the burden of its own logic. Upon these ruins he constructs what is, in the end, the untheistic political theory of the *Second Treatise of Government*. There Locke suggests that the primary moral fact regarding man is not reason or sociability, but self preservation. Although Locke follows Grotius in implicitly denying God's central place in the equation of

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39. Forde, p. 647.

human purpose, he differs from Grotius insofar as he follows that claim to its logical conclusion -- if there is no necessary transcendent dimension to human life, then self preservation becomes paramount. But Locke clearly intends to distance himself from the Hobbesian idea of self preservation as mere survival.

Grotius said that human dignity was rooted in the rational, social element of human nature. Promising, as the outward sign of this rational sociability, was the most important dictate of natural law, thus pointing to the relational dimension of human being as the primary moral fact. But the claim that human beings are, or should be, moral carries no weight unless human life is seen as pointing beyond itself. Absent the possibility of divine sanction, Grotius' insistence that men tend naturally to cooperation is no more convincing than Machiavelli's insistence that they do not.

In his formulation of natural law, Locke looks no further than the most basic element of humanity -- the individual. For him, dignity is rooted in autonomy. Self-preservation -- that is, preservation not so much of life as of the *self* -- is the fundamental dictate of nature. The concept of property begins with self-ownership and extends to all products of the self's expenditure of labor. Thus, as the manifestation of self-ownership, property is to Locke what promises are to Grotius. Just as Grotius found promises to be the best expression of human sociability and therefore the main focus of natural law, Locke views property -- defined as ownership of both the self and the products of the self's expenditure of labor -- as the primary moral fact. The focus of natural law is now the individual. Let us now turn our attention to the way Locke carries the premise laid by Grotius -- an untheistic natural law resting on a denial of

human nature as fallen -- to its inevitable conclusion, arriving at the idea which overturns the notion of natural law altogether -- the theory of autonomous self as rights holder, from which contemporary human rights arguments take their bearing. To this end we will examine Locke's *Questions* and his *Second Treatise of Government*. Our purpose in examining the former will be to determine how Locke, in presenting an argument ostensibly in support of the traditional understanding of natural law, actually undermines it. This lays the ground for the ideas advanced in the *Second Treatise*, where government serves the autonomous self, from whom all political power devolves.

The natural law teaching Locke propounds in the *Questions* bears a traditionalist veneer, but if we scratch just below the surface we see that Locke is actually deconstructing traditional natural law. This leaves him free in the *Second Treatise* to build a new theory in its place, that of natural rights. A close examination of the structure of Locke's argument in the *Questions* reveals that although Locke always refers to one "law of nature," he is essentially writing about *two* natural laws: one that looks more like traditional natural law than that offered by Grotius, and a more subtle, radical version that is to form the basis of the argument of Locke's *Second Treatise of Government*. Locke levels a significant critique of Grotius in the area of the obligatoriness of natural law. Whereas Grotius, famously claiming that the law of nature holds even in the absence of God, located the obligatoriness of natural law in its content, Locke holds that the obligatoriness of natural law derives from not from its content but its source -- the will of God. For Locke, the law of nature is inseparable from the idea of God. As Michael Zuckert explains, "the centerpiece of Locke's

argument, therefore, is a rational proof for the existence of God, and thence of the existence and content of the natural law.”<sup>39</sup> Yet he shares with Grotius the desire to found a natural law independent of theology, for he insists that the precepts of the law of nature must be determined independently of revelation. Indeed, we shall find that Locke’s purpose is not really to rescue the idea of natural law from the errors of Grotius, but to erect a philosophical straw man, easily overcome by a more radical natural law which, in the end, is not really a rejection, but the logical conclusion of the premises laid by Grotius.

Locke’s *Questions* may be divided into three main sections: the existence of natural law (Question I), its knowableness (Questions II-VII), and its obligatoriness (Questions VIII - XI). Question I, concerning the existence of the law of nature, may be considered a microcosm of Locke’s entire project -- while it puts forth arguments that appear to draw support from the traditional understanding of natural law, it simultaneously undermines them. Locke begins by noting that anyone who “recognizes that either some rational account of our life is necessary or that there exists something deserving the name of either virtue or vice,” will conclude that “god” exists:

Once it has been granted that some divine power presides over the world -- something it would be impious to doubt . . . for all creatures in their obedience to his will have their own proper laws governing their birth and life; and there is nothing in all this world so unstable, so uncertain that it does not recognize authoritative and fixed laws which are suited to its own nature -- once this has been granted it seems proper to ask if man

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39. Zuckert, pp. 188-89. Zuckert notes that one reason for this difference between Locke and Grotius may be that Grotius did not find the essential quality of law in the will of a superior because he was interested in developing the law of nations; “But between nations there is no superior, and therefore, if the will of a superior is necessary for a law, there is no law of nations and no subject matter for Grotius’s treatise. (p. 190)

alone has come into this world entirely outside some Jurisdiction, with no law proper to him, without plan, without law, without a rule for his life -- something he who has given thought either to god, best and greatest, or to the universal agreement of the entire human race in every time and place, or finally, to himself or his own conscience, will not easily believe. (Fol. 9)<sup>40</sup>

Initially, Locke seems to be saying that the very existence of natural law is itself proof of God. But then we find that he actually cites three sources for the existence of natural law: “god,” the “universal agreement of the entire human race in every time and place,” and man himself and “his own conscience.” (Fol. 10) We shall see how Locke’s discussion of natural law effectively eradicates God and the universal agreement of mankind as valid sources. The ultimate source of natural law will turn out to be man’s “conscience.”

Locke’s explanation of promulgation, or how the law of nature is known, appears to hold the kernel of his philosophy of natural law, and lays the groundwork for his eventual teaching on the natural rights of man. In Question II, Locke answers affirmatively that the law of nature is knowable by the light of nature. On the surface, this seems to be in step with the traditional natural law teaching, but a closer look reveals deep differences, for the light of nature does not reveal what is written on the heart, but rather, “the kind of truth whose knowledge man can, by the right use of those faculties with which he is provided by nature, attain by himself and without the help of another.” (Fol. 23) This is most difficult for the average man to discover:

How rare is the man in a commonwealth who knows the laws of his city, which have been published, displayed in public places, easy to read and

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40. Locke, John, *Questions Concerning the Law of Nature* (1664), edited and translated by Robert Horwitz, Jenny Strauss Clay, and Diskin Clay (Ithaca: Cornell University Press, 1990).

comprehend, and obvious to every eye; How much rarer is he who knows the hidden and unperceived laws of nature? In this question, therefore, we must consult not the majority of mankind, but the sounder and more perceptive part. (Fol. 16)

Before considering this further, let us look at the methods whereby Locke says natural law *cannot* be known. He identifies four methods of knowledge: inscription (that which is “inscribed in hearts by nature”), tradition, sense and revelation. Questions 3, 4 and 5 are elaborations on these points. He then proceeds to deny that the natural law can be known through inscription, tradition or revelation. First, Locke discounts revelation as a means of knowing the law, since his inquiry concerns not “what man has the power to know when filled by the divine spirit,” but what man can know “by the power of nature and his own sagacity.” (Fol. 23-24) Neither is the law of nature known via tradition, for “tradition is not a primary and certain means of knowing the law of nature.” (Fol. 27) since “men’s opinions are so manifestly contradictory and in conflict with one another, not only in different nations, but within the same state.” (Fol. 29) (Of course, this flatly contradicts the Locke of Question I, who pointed to the agreement across culture and time as evidence of the existence of a law of nature.) Determining which tradition is correct requires that “either reason or judgment must be applied in coming to know the law of nature as it is promulgated by tradition, and then all tradition loses its authority, or the law of nature cannot become known through tradition; or there will prove to be no law of nature.” (Fol. 30) Locke does not explain why revelation is not to be considered a primary means of knowing natural law, but he does not need to; for in denying tradition any role in knowing the

natural law, he equally undermines the value of revelation. For apart from those present at the formation of a religious community, tradition, or knowledge passed down via scripture or some other means, is the primary way revelation becomes known. Indeed, Locke himself affirms:

Some, even nearly all, of the precepts of this law are handed down to us by our parents, teachers, and by all those who busy themselves in forming the character of the young and filling their still tender minds with the love and knowledge of virtue . . . All who have given any thought to educating the minds of the young, especially while in the earliest period of life, lay down as the foundations of their virtues, and with the greatest care, reverence and love for the divinity, and instill in them obedience towards their superiors, faith in keeping promises, truthfulness, clemency, liberality, purity of morals, and the other virtues. (Fol. 26-27)

So while Locke agrees that the functions of tradition listed above may help people to know natural law, he insists that “the law of nature, insofar as it is a law, does not become known to us by tradition.”(Fol. 28) He adds that “If the law of nature could be learned from tradition, this would be a matter of faith rather than knowledge, since it would depend more on the authority of the speaker than the evidence of the thing itself, and thus, in the end, it would be a derivative rather than an innate law.” (Fol. 30) Locke seems to discount the idea that faith *is* a way of knowing, since all knowledge builds on the acceptance of principles already laid. Even philosophy ultimately begins with faith -- the unproven assumption that the universe is ordered, or not.

Thus, in Question III, Locke asks “Does the law of nature become known to us by tradition?” and answers simply, with no further elaboration, “It does not.” Tradition, through which all teaching of virtue and faith is handed down, ultimately has nothing to

do with natural law. That is to say, the natural law cannot be based on principles communicated by others. This is the first of three questions in which Locke provides only a one-word answer. But what Locke does not say may carry as much importance as what he does say, and it is in the lacunae of these three short answers that we glimpse what may be Locke's real intention -- to replace traditional natural law with a new theory of natural rights. By divorcing natural law from faith and revelation, Locke effectively removes the cornerstone of the theory. For although natural law employs reason to discern the operation of nature and man's place within it, it starts from the assumption that the world is indeed ordered.<sup>41</sup> For Locke, natural law must begin and end with what man perceives with his own senses, apart from any knowledge to be derived as a result of living with others. Whereas Christianity would hold that the self cannot be known apart from its relation to the other -- either God or one's fellow man -- Locke's view is that the self is not so much discovered, but created by oneself through perception and reason.

The corollary to denying the assumption of an ordered universe and the self as intrinsically connected to the other is the denial of human nature as fallen. This is seen

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41. Ernest Fortin contends that acknowledging an ordered universe is necessarily to acknowledge God. He says that Thomas, while arguing that the precepts of the Second Table of the Decalogue are "self-evident to all human beings," basically concedes that the natural law depends on acknowledging God: "Since all laws draw their effective power from the will of a lawgiver . . . it (the natural law) becomes intelligible only within the framework of a providential order in which the thoughts, word, and deeds of individual human beings fall under God's supervision and are duly rewarded or punished by him . . . the truth of the proposition that the God of nature is a solicitous God, entitled to and demanding the love and worship of all rational creatures, would appear to be secured only through the precepts of the First Table, which, by Thomas's own admission, are not universally accessible without the aid of divine revelation." (Fortin, Ernest, "The New Rights Theory and the Natural Law," 44 *Review of Politics* 1982, p. 609. See also Pangle and Ahrens Dorf, p. 85. Citing Vitoria and Suarez, they note: "We may begin to wonder whether there is in the *Summa Theologiae* a strictly natural basis for morality, or whether the loving and punitive divine providence vouched for by revelation is not always somehow presupposed."



in Question IV, where Locke insists that the natural law is not inscribed in the minds of men, known by innate principles. He cites as evidence of this the great variations in human morality:

If this law of nature were naturally impressed entire on the minds of men immediately at birth, how does it happen that all men who are in the possession of souls furnished with this law do not immediately agree about this law to a man, without any hesitation . . . it would not do away with all doubt . . . by claiming that this law, which has been inscribed by nature in our hearts, was either partially effaced by the fall of the first man or utterly and everywhere destroyed (which argument is completely unknown to the greatest part of mankind, who have never once given a thought to the first man or to his fall). (Fol. 143)

Locke goes on to deny that there is any agreement whatsoever among men concerning the precepts of natural law, and says that much of what is considered to be part of natural law is merely tradition -- lessons handed down over generations. (Fol. 43-44) Now, Thomas would not deny that there are competing versions of morality among human beings, but for him, this does not deny the existence of natural law; for he would argue that all subscribe to the same fundamental precept -- "Good is to be done, evil avoided." It is in applying this precept to the practical conditions of life that men differ. But unlike Thomas, Locke does not view the natural law as immanent -- it is neither universally known nor practiced.<sup>42</sup> He simply denies the Thomistic idea that

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42. See Zuckert, pp. 202-203: "If the natural inclinations point to the precepts of the natural law, one would have to expect a real presence of the natural law in the world, in human actions, and in human standards of praise and blame. ..Locke's truly decisive reason for rejecting the Thomist doctrine stems from his very different reading of what the natural inclinations actually incline toward...(For Locke,) the natural inclinations impel toward one's own profit, advantage, or benefit...the natural inclinations are self-regarding and thus cannot be the source of the social virtues ... Locke affirms that there are 'natural inclinations,' but they are not moral in character, that is, they do not point toward a moral law of nature...Nature is pure immanence -- what works everywhere the same. Thomas, following Aristotle, was deploying a conception of nature of a different sort: nature exists as tendencies and ends; nature often fails in her operations."

the natural law can be known though inclination, and seems to believe that even the most basic principles can be grasped only with great effort:

For a man to penetrate into the hidden nature of these things by reasoning and arguments based on sensible and obvious things, there is need for the concentrated meditation of the mind, thought, and care . . . they must gird themselves for work, and that wealth which has been hidden in the darkness must be excavated with great labor. It does not offer itself up to the idle and indolent, nor indeed to all who seek it, since some till to no avail. But, if we should discover only a few who are guided by reason in the concerns of their daily life, there is no wonder that concerning this law, which is not so easily apprehended, there is such a great variety of opinions among mortals. (Fol. 34-35)

As Locke explains in Question V, the law of nature, then, can be truly known in no way other than by the “light of nature,” sense and reason. Reason is the “discursive faculty of the soul which progresses from the known to the unknown, and deduces one thing from another by the certain and valid consequences of propositions.” (Fol. 50)

All reason must build on information that comes to us initially through the senses. To know how sense and reason lead us to a knowledge of natural law, Locke says, we must first establish the principles by which any law is known. There must be a superior, or a lawgiver, to which one is subject, and the will of that superior must be known. (Fol. 52)

Now, says Locke, the use of the senses points to the existence of a lawgiver -- God -- for they perceive an order to the world and its operation. Reason takes the information received by the senses and concludes that “it could not have been formed by chance and accident into a frame so fitting, so perfect everywhere and wrought with such skill;” thus, there must exist some “powerful and wise creator,” not only because man could not create himself out of nothing, but because:

Man does not find in himself all those perfections of which his mind can conceive. For, if man were creator of himself, someone who could give himself being, who could bring himself into the world, he would also have granted himself an eternal duration for his existence . . . For it is impossible to imagine anything so hostile and inimical to itself which, though it could grant itself existence, would not at the same time preserve it, or which would be willing to readily abandon it once the course of its brief life had been spent; without life, all other things, dear, useful, pleasant, blessed, cannot be preserved and are sought in vain. (Fol. 55)

If man would not be so “hostile” as to grant himself a limited life, then it follows that the hostile party is God, who holds the keys to life and death. Thus, while the senses may point to the existence of a creator, reason implies that he is not loving and providential. Indeed, although Locke notes that reason can lead us to the knowledge of God, he also points out that we might “reasonably” doubt whether the idea of God is natural to man, since “there exist some races in the world who recognize no divine power at all.” (Fol. 57) But even among those peoples that do not recognize the existence of God:

There exists nowhere a race so barbarous, so far removed from all humanity, that it does not take joy in the use of the senses and is not superior to brute beasts in the privilege of reasoning and the faculty of argumentation . . . And for this reason all men, wherever they are, are adequately provided by nature for the investigation of god in his works ... It is obvious, therefore, that men can infer from sensible things that there exists some powerful and wise being who has jurisdiction and power over themselves. (Fol. 58)

We find here the crux of Locke’s subtle argument. For although the “use of the senses” and the power of reasoning are natural to man, the longing for God, or truth, is not. Man *might* reason his way toward the possible existence of God (although he will likely be disappointed in what he finds, given the less than providential portrait of God

Locke provides), but whether he actually does so is less important than the fact that all men have the ability, through reason, to draw such conclusions. In this way, Locke establishes reason as the most fundamental fact of human being -- not in the classical/Christian sense as being in the service of transcendent truth -- but in the service of the self. For Plato and Aristotle, philosophy was an end in itself, intrinsically connected as it was with man's final end -- truth. Augustine acknowledged that nothing rests until it rests in God. But the God Locke sees does not offer a very welcome respite. Thus, reason is assigned a new role -- valued as a process, not for its connection with the transcendent but as a means toward the lowered end of self-preservation:

It seems that the function of man is what he is naturally equipped to do; that is, since he discovers in himself sense and reason, and perceives himself inclined and ready to perform the works of god . . then, he perceives that he is impelled to form and preserve a union of his life with other men, not only by the needs and necessities of life, but he perceives also that he is driven by a certain natural propensity to enter society . . .

And indeed, there is no need for me to stress here to what degree he is obliged to preserve himself, since he is impelled to this part of his duty, and more than impelled, by an inner instinct. (Fol. 60-61)

Note that man "perceives" that his function is to do the works of God and "perceives" that he is impelled to live in society. But when it comes to survival, Locke does not say that man "perceives" that he must preserve himself, but is in fact "impelled" and "more than impelled" to do so by an "inner instinct." The more forceful presentation of the survival urge in contrast to the need to know God and live in

society indicates wherein, for Locke, the important fact of human nature lies. Again, this reinforces the deep difference between him and the Christian natural law tradition:

If there is no natural law, properly speaking, no limit human beings are naturally obliged to keep, then it would seem to follow that they possess by nature the opposite, a natural right of “free use.” . . . Locke does not deny that there are natural inclinations, he denies only that these are directed to the natural law as taught in the tradition. Instead, he shows, they point to self-preservation, or more broadly, self-interest . . . If the driving force for human beings is their “instinct for preservation,” then their defining or driving quality is not their rationality or sociability, a la Grotius, but their mortality.<sup>43</sup>

And yet, this argument is immediately followed by the second of Locke’s short “lacuna” answers, in which he states simply that the law of nature cannot be known from the natural inclination of mankind. Thus it would appear that the drive for self-preservation, while constituting the chief natural inclination of man insofar as any can be discerned, is not the whole of the law of nature. Just as Locke implicitly rejects the connection between natural law and God in Question III, in Question VI he equally rejects the lowered Hobbesian connection between the law of nature and mere survival. This is confirmed in Question VII where Locke argues that even though self preservation seems to be the “primary and fundamental law of nature,” this is not always the case, since in some cultures slaves, servants and wives willingly accompany deceased kings to the tomb. (Fol. 75) This confirms that although the instinct to preservation is the attribute most uniformly found among men, it is not the essence of the natural law, which is concerned with both preservation and the process of reason.

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43. Ibid., p. 212.

This becomes more patent in Questions VIII and IX, which concern the obligatoriness of the law of nature. Locke offers Question VIII, which affirms that the law of nature is binding on man, ostensibly as an answer to those who equate the entire law of nature with self preservation, “and seek no deeper foundations for it than self-love and that instinct by which each man cherishes himself, and looks out, so far as he is able, for his own safety and preservation.” (Fol. 82) Locke lays out the elements of a viewpoint he initially appears to be arguing against:

If the care and preservation of one’s self should be the fountain and beginning of this entire law, virtue would appear to be not so much man’s duty as his interest, and nothing would be right for a man were it not useful. And keeping this law would be not so much a duty and debt to which we are bound by nature, as a private right and benefit to which we are led by a sense of our own advantage. As a result, whenever it pleases us to yield our right to self-preservation, we cannot neglect and break this law without possible harm to ourselves, but we certainly can without incurring guilt. (Fol. 82)

If the law of nature begins and ends with self preservation, Locke says, then following it is not so much a matter of duty (which implies owing something to another), as of right, exercised on the basis of personal interest, and as such, incurring no obligation. Locke appears ready to argue against this notion and to “come to a true understanding of how the law of nature is binding and how great its obligation is.” (Fol. 83) To “prove” that the law of nature is binding on men, Locke sets out to inquire about the nature of obligation itself. In so doing, he succeeds in casting serious doubt on the authority of God, who is supposed to be the source from which the law of nature derives its obligatory force.

Following the definition of law he laid out earlier, then, Locke affirms that in order to be binding, a law must issue from a higher power and be known to those to whom it is directed. Although the threat of punishment can obligate those who are “unwilling to be led by reason,” Locke insists that obligation essentially derives from “the power and that authority which someone holds over another; either by right of nature and creation, since all things are rightly subject to that by which they have both first been created and continue to be preserved, or by the right of donation, as when god, to whom all things belong, has transferred some part of his authority to another.” (Fol. 85) Obligation is a matter of respecting the right of another; in this case, it would seem, that of God, who gives us life and *preserves* it. But as we shall see more clearly in the *Second Treatise*, Locke seems to believe that man, rather than God, bears more of the responsibility of creating and preserving a meaningful life.

Thomas, who called law a promulgated dictate of reason for the common good, promulgated by him who has care of the community, found the essence of law in its formal cause; the ways in which the various elements of law come together to make it the thing it is. Grotius saw the essence of law as being in its function, but Locke sees the essence of law as flowing from its source -- its efficient cause:

That which is the first cause of all obligation, and from which its formal definition flows, binds “effectively,” and this is the will of a superior. Indeed, we are bound to something because he, under whose power we are, would will it. (Fol. 86)

We are bound to the law of nature, Locke says, because God wills it so. The source of our obligation is the will of God. Indeed, “the declaration of his will

determines the principle of our obligation and our obedience, because we are only bound to what a legislator has in some manner made known and published as his will.” (Fol. 87) Thus, it would seem that we are only bound to obey the natural law if we can know God’s will with certainty. Ultimately, for Locke, natural law is true, not in and of itself, but only insofar as God wills it. Thus, if we cannot determine the will of God, we are not bound to uphold the natural law. Locke proceeds to supply several reasons as to why men *are* bound to uphold the natural law, but it soon becomes clear that these undermine, rather than reinforce the idea of God as lawgiver.

The law of nature is binding, Locke explains, because it meets the requirements of law: God, the author of the law, willed it and “published it sufficiently that anyone could know it, if he were willing to devote time and energy, and turn his mind to its understanding.” (Fol. 88) But Locke’s earlier arguments make clear that the natural law is not readily apparent to human beings, so much so that there would actually seem to be very few people in a position to discover it. This seriously undermines the idea of natural law. As Zuckert says:

Locke argues that . . . universal ignorance (of the law) is a blamable or guilty ignorance, for the natural law is accessible in principle to all rational creatures -- or at least to the very intelligent who apply themselves assiduously to the task . . . Yet to claim that ignorance of the natural law is guilty ignorance is to imply that human beings can be pronounced guilty and blamable prior to their knowledge of the natural law. Locke shows us, in other words, that there is a deep incoherence in the idea of transcendent natural law.<sup>44</sup>

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44. Ibid., pp. 206-210.



Locke says that since God is superior to all things, and gave us possession of our “body, soul,” and “life,” “it is right that we live obedient to the prescription of his will.” (Fol. 88) But what is the prescription of God’s will? If the natural law is not to be found in human inclination, tradition or common opinion, but only as the fruit of an activity of the mind, which, we have seen, may lead to serious doubts about the goodness of God, how are we to know the will of God and why should we obey it? This argument better supports the idea of man as an autonomous being possessing natural rights than as an image of God who owes allegiance to the natural law.

Furthermore, Locke says that “if the law of nature is not binding on men, god’s divine, positive law cannot be binding, and this no one will claim. In the case of either law, the foundation of obligation is the same, that is, in the manner of their being promulgated and the distinct modes of our coming to know them.” (Fol. 89) Here, as elsewhere, Locke presents a highly questionable claim as established fact. To begin with, as Locke points out again and again, many people who are in possession of reason seem not to be bound by God’s positive, divine law. Locke also does something that the Christian natural law tradition does not do, which is to collapse the distinction between divine and natural law.<sup>45</sup>

Finally, Locke delivers the final blow to his philosophical straw man, noting that if the law of nature is not binding, neither is human positive law, “since the laws of the civil magistrate derive all their force from the binding power of this law.” (Fol. 89) If

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45. Thomas said that although the natural and divine law were both part of God’s eternal law, they fulfilled two different ends of man - natural and supernatural. Natural law may require acknowledging God, or truth, but it would not be construed as dictating specific religious practices the way revealed law does in Judaism and Islam.

kings rule by a divine right, (Fol. 85), then indeed, the collapse of natural law would entail the collapse of monarchical rule. As Locke says, “the laws of the civil magistrate derive *all* their force from the binding power of this law.” (Fol. 89 - emphasis added) To obey a king out of fear, Locke says, is to give currency to “tyrants, thieves and pirates.” No, a king must be obeyed out of “conscience, because he obtains his rule over us by right, that is, at the command of the law of nature.” (Fol. 90)

So the essence of the law of nature issues from the authority of its source. Locke has lumped the law of nature with the existence of God, divine law, and civil law. Doubt cast upon any one of these elements would cause the rest of the structure to come toppling down like a house of cards. Grotius based the law of nature entirely on man; Locke bases it entirely on the existence of God.<sup>46</sup> Of the many assertions Locke has put forth so far, the only point on which he has been consistent has been the fact that man is a reasonable being naturally inclined only to self-preservation. Given the serious doubts Locke has raised about the goodness of God and our obligation to obey him, we may say that Locke has effectively wiped clean the existing slate for viewing law and government, thus opening up the conditions for the state of nature from which he will launch his natural rights argument in the *Second Treatise*.

Following this discussion is the third of Locke’s one-word answer questions, in which he states that the natural law is not binding on brutes. Viewed together, these

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46. See also Zuckert, pp. 206 - 208: “Locke’s natural law is transcendent because both the knowledge and obligatoriness of the natural law are absolutely dependent on rational knowledge of the existence and the will of the transcendent God . . . The burden of Locke’s *Questions* is to show that the natural law must be such a transcendent thing or no natural law at all. Only as transcendent can the natural law retain its quality as law, which requires both that the law be sufficiently promulgated and that it be properly binding.”

questions create a composite of what Locke views as the prototypical human nature. Recall that in Question III, Locke stated that natural law is not known by tradition, for the only source of authority is that which is found *within* oneself. This contradicts Locke's later statement in which he equates natural law with divine law; for if both yield the same conclusion, what does it matter if one reasons to those conclusions or follows the law as given? In Question VI, Locke affirms that the natural law is not known through natural inclination, for the only natural inclinations we have point to self-preservation. But Locke does not mean to say that the survival urge is the highest, or most authoritative inclination of man. In Question IX, Locke states simply that the natural law is not binding on brutes. This confirms that Locke is not interested merely in preservation, which human beings share with all living creatures, but in preservation according to Locke's definition, in which the defining quality of human being is the ability for rational activity of the mind. If the existence, or at least, involvement of God is not assured, and man is not naturally inclined to society, then ultimately, man is at root a lone, autonomous individual.<sup>47</sup> Therefore, as Zuckert explains:

If there is no natural law, properly speaking, no limit that human beings are naturally obliged to keep, then it would seem to follow that they possess by nature the opposite, a natural right of "free use" . . . Morality is not the first principle of human action, as the Thomists and Grotius had it. The ground of "natural law," or morality, is now understood by

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47. Zuckert notes that "Whereas Grotius had argued that natural sociability was part and parcel of the natural law, Locke finds that compact derives not from natural law, but "common human necessity or advantage" thus advocating an "individualistic interpretation of social life: human society does not imply natural sociability." He adds that "If, Locke is saying, the law of nature derives form and expresses the principles of human sociability, then the very division of mankind into separate and potentially warring nations is itself contrary to the law of nature . . . Locke suggests in its context, as an alternative to Grotian natural sociability, the possibility 'that in the state of nature war is common, and there exists among men a perpetual, mutual, and internecine enmity.'" (pp. 205-206)

Locke as natural right, and therefore the main requirements of morality can be restated in terms of rights.<sup>48</sup>

Together, then, these short answers clear the ground for a new theory of natural rights. Unlike that of the Christian tradition, the new natural law does not encompass truths that are both inscribed on the heart and passed down through tradition; for traditional faith would seem to be at odds with the kind of God to which Locke's reasoning points. The new natural law does not call man to reach beyond himself, but neither is it about bare survival. It is about *self*-preservation -- that is, man's self creation and preservation as an autonomous, rational, choosing, being. In the *Second Treatise*, Locke will develop the point that although God may supply the very raw materials of human existence, the human being is the creator of the *self* -- through rational activity. Man has no obligation to anyone but himself, for cultivation of the self is his chief aspiration and end.

It may be argued that Question IX is the coda to Locke's statement on the new law of nature. Questions X and XI, taken together, seem to imply that although Locke doesn't think natural law is true, he does believe it is good for the community. Let us consider this point further. In Questions X Locke answers affirmatively that the law of nature is perpetual and universal. He carefully lays out a possible objection to this idea, which is on the whole better argued than the rebuttal he does supply. The objection points to the fact "that men have various and manifold opinions concerning the law of nature and the basis of their duty is perhaps the only thing about which all mortals have

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48. Ibid., pp. 212-214.

the same opinion.” (Fol. 91) Indeed, there is such a wide variation in human conduct and morals one might reason that “nature, the mother of all cannot be so cruel that she would want mortals to obey a law which she has not taught, which she has not adequately promulgated. From these considerations it seems necessary to conclude that either there is no law of nature anywhere or that some peoples are not bound by this law and thus that the obligation of the law of nature is not universal.” (Fol. 93)

To this objection, so clearly in line with Locke’s own musings on the subject, he answers that the law of nature is perpetual and universal, but does not really explain *why* it is so. Rather, he seems only to describe the meaning of the terms “perpetual” and “universal.” Having already laid what are for Locke the foundations of the obligation owed the law of nature (a spurious argument for the existence of God), Locke says that therefore the obligation of the law of nature is perpetual, in that “there is no time in which a man would be permitted to violate the precepts of this law.” (Fol. 94) He then goes on to make some observations about the obligations the law of nature entails, and says that some things, like stealing and killing are “absolutely prohibited,” despite the fact that he says at the beginning of Question X that “one can rightly doubt that the law of nature is binding upon the human race as a whole,” given the fact that theft and killing are perfectly acceptable in some cultures. (Fol. 91-92) He then includes, as obligations falling under the law of nature “reverence and fear of the divinity, a sense of duty toward one’s parents, the love of one’s neighbor, and other feelings of this kind.” (Fol. 95) Here is more evidence of the fact that for Locke, there is no distinction between divine law and natural law, for of those obligations of the law of

nature that are perpetual and universal, Locke includes “prohibitions against theft, debauchery, calumny” and “injunction to charity, faith etc.” (Fol. 97-98). Locke has merely distinguished between obligations that he says are perpetual, and the ones that depend upon circumstance (for example, duty to one’s children requires having children) and says that given these distinctions, we can say that the law of nature is perpetual. But the objections he raised to the idea of universality -- specifically the variation among peoples with regard to these so-called universal laws of nature -- are left unanswered. Finally he says:

Should a person come to doubt whether the obligation of the law of nature is universal because the opinions of men concerning their duty are so varied, their morals so conflicting, he should know that this disagreement of mortals, both in the conduct of their lives and in their opinions, does not exist because the law of nature changes from nation to nation but rather because men are either seduced by long established habits or the examples they discover at home, or are driven athwart reason by their passions, and surrender themselves to the morals of others, and . . . they do not permit themselves to rely on their own reason . . . Indeed, he who is unwilling to open his eyes is as prone to error as he who is born blind . . . There is no need to belabor the question of babes and fools, for even if the law of nature were binding on all to whom it is given, yet it is not on those to whom it is not given, and it is not given to those by whom it cannot be known. (Fol. 103-104)

The law of nature is *not given to those by whom it cannot be known*. Remember that although Locke has basically subsumed everything taught by divine revelation into the category of natural law, he still denies tradition or revelation as the way that one properly comes to know the natural law. The law of nature cannot be called such unless it issues from God and is promulgated to all. But the very means by which it is

promulgated -- discursive reasoning to conclusions -- can lead one, reasonably, to doubt the existence of God, or to question divine providence.

Question X, then, simply reinforces the doubts Locke has already cast upon the existence of a law of nature and its attendant duties on the human race. But in Question XI he nevertheless seems to recognize its usefulness. He answers negatively the question that asks whether the private interest of each individual constitutes the foundation of the law of nature. Like Grotius before him, he notes that some thinkers deny the existence of natural law, claiming that all living beings are driven by self-interest, and that the very idea of natural law is the “height of folly, since a person who takes into consideration what is of benefit to others does injury to himself.” (Fol. 105)

Before he answers what the foundation of natural law is, Locke is very clear about what it requires. It is:

That which supports and upon which are erected, as upon a foundation, all the other precepts of this law, even the less obvious, and that from which these precepts can be deduced in some manner. As a consequence, these derive their entire force and their binding power from this foundation because they are in agreement with this primary and, as it were, fundamental law, which is the rule and measure of all the other laws which depend upon it. (Fol. 107)

Locke goes on to say that if the law of nature was primarily about self-interest, then all who are venerated as heroes for their courage and sacrifice on behalf of others are not only fools, but violators of the natural law, thus deserving not accolades but condemnation. Most of Locke’s answer to this question is a lengthy testimony to the benefits accrued by virtue to both the individual and the community. Locke concludes that if the law of nature is primarily about self-interest, then we violate it whenever we

act altruistically, which means that the law of nature has no binding power, and is therefore not law. (Fol. 116) But if its binding power is the essence of law, then even the law of nature as Locke apparently advocates it is not binding, for he has already devoted the greater part of his work here to claiming that human beings do not follow the law of nature, and are not virtuous. Thus, Locke is giving further indication that he himself does not really believe in the existence of a law of nature. But yet, he recognizes the importance of virtue to society. As Zuckert says:

Whatever its defects, the natural law tradition has something crucial to say, and Locke does not want to demolish its hold on the minds of his compatriots. Nature may guide human beings to pursue their own advantage, but the result of a “natural” life is not pretty . . . In other words, morality, more or less of the sort endorsed in the natural law tradition, is part of the answer to the problem nature poses for human existence. Thus Locke wishes to retain the law of nature, or some version of it, at the same time that he levels a very powerful theoretical critique against it.<sup>49</sup>

Just as Grotius spends much of *De Jure Belli Ac Pacis* undermining Christianity, only to turn to it in the end as a justification for abiding by the rules of war, Locke seems to want to reap the benefits of natural law without any adherence to its rules.

In the *Questions*, Locke’s subtleties and silences speak volumes about the human condition as one of reasonable beings struggling for survival in a hostile world. This philosophy provides the foundation for natural rights. The *Second Treatise of Government*, to which we now turn, reinforces this idea of human nature and indicates the purpose of government according to this view. Although Locke differs from Grotius in his presentation of the natural law, this is overshadowed by his agreement on

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49. Ibid., p. 214.



the larger issue -- a denial of original sin and the subsequent conclusion that God is unprovidential at best, or hostile at worst. From this view it is but a short step to replacing the old idea of natural law with a new theory of natural rights, in which the source of dignity is rooted not merely in man as a human being, but in man as an autonomous being. This leads directly to the philosophical assumptions undergirding current human rights theories.

Our examination of Locke's *Second Treatise* will focus on three main points: Locke's discussion of the state of nature, in which he outlines a view of the origin of man and further underscores the purpose of human being as the preservation of the self; the resulting view of community as essentially unnatural; and from this, a discussion of the natural executive power as the new principle upon which government should be based.

First, let us examine Locke's views regarding the origin and purpose of human society -- an argument which, despite Locke's frequent references to scripture, is less congruent with Genesis than with the theories set forth in the *Questions*. Just as Genesis describes the origin of man and thus informs the entire content of revelation that follows, Locke's description of the state of nature, or man's original state, lays the foundation for his discussion of man's function and therefore, the function of government. Locke begins, not with the idea that man has fallen away from a loving God, but, as already established in the *Questions*, that God himself is not providential. In this way, he sees the end of man, not as union with God, but as self-preservation, defined as protection of life, liberty and property:

Reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions . . . the law of nature . . . willeth the peace and *preservation of all mankind* . . . In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure god has set to the actions of men, for their mutual security; and so he becomes dangerous to mankind, the tie, which is to secure them from injury and violence, being slighted and broken by him. (II.6-8)<sup>50</sup>

Although Locke defines the law of nature differently than Grotius, his purpose is much the same. The purpose of natural law -- or, the will of God, since for Locke the law of nature and God's will are equivalent -- is "peace and preservation." The "tie" of natural law -- what links all of mankind together -- is protection and preservation. Thus, where the ancients saw the purpose of human nature as union with truth, and the Christian tradition identified it as union with God, Locke, following Grotius uses the idea of God not as an end in itself, but as a means for preserving the earthly community. And building on the definition laid out in the *Questions*, we see that "preservation" entails not merely survival, but the conduct of an autonomous life. For Locke, life, liberty and property are all equally important aspects of the self.

The right to the preservation of life necessarily entails a right to property: To live is necessarily to work. Property is the result of labor and therefore an extension of self preservation. According to Locke, "God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of

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50. Locke, John, *Second Treatise of Government* (1690) edited by C.B. Macpherson (Indianapolis: Hackett Publishing Company, Inc., 1980).

him. God and his reason commanded him to subdue the earth, i.e. improve upon it for the benefit of life, and therein lay out something upon it that was his own, his labour.”  
(V.32)

Of course, this exactly reverses the order of events in Genesis, which says that before the Fall, man was given dominion of the earth, but without the need to labor. As Zuckert says, “Locke thus collapses two phases of biblical history and entirely overlooks the key event, the Fall. The condition of penury that requires labor is, according to Locke, the condition of the beginning in itself, not a punishment or curse. In the very act of suggesting biblical support for his doctrine, he shows instead the severe difference between himself and the old Testament authors.”<sup>51</sup>

For Locke, it appears, man was placed on earth to work for survival. Labor, now forming an integral part of man’s *telos*, is thus elevated to the level of the sacred, along with the possessions we accrue as the result of our work.<sup>52</sup> Something becomes our own when we mix our labor with it; for we all possess property in our own person, and “whatsoever he removes out of the state that nature hath provided, and left it in, he

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51. Zuckert, p. 260. See also Paul A. Rahe, *Republics Ancient and Modern: New Modes and Orders in Early Modern Political Thought, Vol.2* (Chapel Hill: The University of North Carolina Press, 1994), p. 271: “Despite all that God has given man richly to enjoy, his neediness turns out to be his defining characteristic . . . Neediness is God’s provision for man, and this sanctions and even sanctifies an emancipation of man’s acquisitive instincts.”

52. Thus, Rahe argues that Locke “provided the theoretical underpinnings for a new species of indirect government based on the presupposition that man is by nature not a political but a tool-making animal -- and giving therefore to calculating reason, labor and trade a primacy once reserved for moral rationality, politics and war. For the first time in human history, it became possible for a philosophical teaching to supplant religious belief, become ‘the soul of a people,’ and come to serve as that ‘*something*’ in the constitution of the community ‘which is settled, permanent, and not to be called in question.’” (p. 289)

hath mixed his labour with, and joined to it something that is his own, and thereby makes it his *property*.” (V.27)<sup>53</sup>

But magnifying the importance of man’s work has the effect of diminishing the significance of God’s; for one crop that man has cultivated is worth far more than anything provided by nature. (V.40):

It is *labour* then which *puts the greatest part of value upon land*...man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property. (V.43-44)

As in Grotius, Locke’s conclusions run counter to the biblical truths he ostensibly sets down as his premise. For we see here that it is man, not God, who puts the value on property, which, without it, “would be scarcely worth any thing.” (V 43).<sup>54</sup> As Locke contends in his *Essay Concerning Human Understanding*, human beings, like “unassisted nature,” have so little raw intellectual endowment that “of all the men we meet with, nine parts of them are what they are, good or evil, useful or not, by their education.”<sup>55</sup> Property thus affirms man as an autonomous being who defines himself through dominion -- the extension of *self*. In the Christian tradition, man’s true identity is found, paradoxically, through an emptying of self, so as to be filled with God. According to Locke, however, the true self is not given by God and discovered by man, but *created* by man, when he mixes his labor with material. Preservation of the *self* is

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53. All italics in quotations are supplied by Locke.

54. See Zuckert, p. 263: “Neither god nor nature ‘has given us all things richly’: men have neither been given ‘all things,’ nor were they given ‘richly.’ . . . In sum, nature provides few things, most unpalatable in themselves, ordinarily small in quantity or, when more profuse, rotting. Locke would first has us believe that humanity finds itself set in a world designed for it by a kindly father; later he shows it to be the sort of place a wicked stepmother might produce.”

55. Quoted in Rahe, p. 276.

the task of man. This requires access to resources (both physical and intangible) and labor. Preservation of liberty and possessions, then, are as fundamental as life, since they are the means whereby man makes his life meaningful. For Locke, man's dignity is conferred, not by his very being, but by what he makes of himself. The autonomous self is to Locke what promises are to Grotius -- the primary moral fact upon which the law of nature rests.<sup>56</sup>

The idea of the autonomous individual as the primary moral fact has profound effects on our understanding of community. In Genesis, for example, marriage is the foundation of community. God creates man not for the purpose of earthly survival -- for death does not come to man until he turns away from God -- but rather, to live in union with God. Marriage is established not for survival's sake, but because it was "not good for man to be alone" -- through his relationship with another, man is better able to live as an image of God.

Locke, in contrast, sees marriage primarily as being necessary for the survival of children, who, unlike other animals, remain dependent for a very long time. (VII.80) The idea of marriage as a survival tool leads to an understanding of community that undermines the goodness of God. According to Locke, God, determining that man should not be alone "put him under strong obligations of necessity, convenience and

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56. See Zuckert, p. 278: "The chief point of Locke's discussion of property in nature is the role of labor in the making of property, both as appropriating power and as transformative power. Through labor, what was not me becomes me, or at least mine. Labor transforms and appropriates; it remakes the given world, the almost worthless raw material, into new and humanly valuable things. If the "great foundation of property" is labor, then Locke is suggesting that the person is himself the product of transforming and appropriating labor. Human making, not divine making, is the primary moral fact. The chapter on property leads up to the suggestion that human beings are self-owners because they are the makers of their selves and they own what they make."

inclination to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.” (VII.77) Thus, we begin with a God who deprives, making us weak to *drive* us into society. Language and understanding seem to be thrown in as consolation prizes. In Genesis, however, the story is the other way round - *because* we are made in the image of God we have language and understanding, and *this* is why we need others -- not for self-preservation. In misrepresenting the facts of Genesis, Locke creates the environment in which natural rights philosophy can flourish. An unprovidential God thrusts man into a formidable world where he must labor heavily in order to survive. So harsh is the natural environment that man requires the help of others who, unfortunately, pose new threats to survival. Soon, man requires protection not only from the environment, but from other people. Community is not natural, but merely useful insofar as it aids in the performance of man’s only “duty,” which is to create and preserve the self. Whereas natural law imposed duties on man based on the view that the self is inextricably tied to the other (be it truth, in the ancient tradition or God and fellow man, in the Christian sense), for Locke, man is beholden only to himself. Therefore, he possesses not a natural duty toward the other, but a natural right to preserve himself.

Although Locke appears to differ from Hobbes in defining a law of nature that is more reason bound than the latter’s theory of matter in motion, it does not take long for the distinction to break down. For although the law of nature permits violence only in response to a threat against preservation, remember that for Locke, life itself is

intrinsically tied to the idea of autonomy. Thus, any potential threat to one's autonomy is equivalent to a threat to preservation:

He who attempts to get another man into his absolute power, does thereby *put himself into a state of war* with him; it being to be understood as a declaration of a design upon his life . . . for no body can desire to *have me in his absolute power*, unless it be to compel me by force to that which is against the right of my freedom, *i.e.* make me a slave. To be free from such force is the only security of my preservation; and reason bids me look on him, as an enemy to my preservation, who would take away that *freedom* which is the fence to it . . . I have no reason to suppose, that he, who would *take away my liberty*, would not, when he had me in his power, take away everything else. And therefore it is lawful for me to treat him as one who has *put himself into a state of war* with me, *i.e.* kill him if I can. (III.17)

Furthermore, the state of war may be ongoing, for the innocent party retains a right “to destroy the other whenever he can, until the aggressor offers peace, and desires reconciliation on such terms as may repair any wrongs he has already done, and secure the innocent for the future.” (III.20) Now, Locke insists that there is a vast difference between the state of nature (“men living together according to reason, without a common superior on earth with authority to judge between them”) and a state of war (“force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief”), but there seems to be a very thin line

of separation.<sup>57</sup> For in reality men are poor judges in their own case, due to “self love...ill nature, passion” and desire for revenge. All these things “carry them too far in punishing others; and hence nothing but confusion and disorder will follow.” (II.13) Thus, although violence toward others is a violation of the natural law, which should “be plain and intelligible to all rational creatures,” individual men are either ignorant of it “for want of study” or so biased toward their own interests as to effectively distort its teaching. (IX.125) It is but a short trip from the relative peace in Locke’s state of nature to the confusion and chaos that reign in that of Hobbes.<sup>58</sup>

If community is a natural, organic whole, then justice will be preserved by whomever has care of the community. For Locke, however, community is not natural. Justice begins and ends with the individual. If the law of nature is preservation and all men are fundamentally equal, man is obliged not only to preserve himself but “to preserve the rest of mankind.” (II.6) Anyone who harms another violates the law of nature and thus “becomes dangerous to mankind.” Therefore, “*every man hath a right to punish the offender, and be executioner of the law of nature.*”(II.8) But the natural executive power -- the right to punish transgressors of the law of nature -- only adds to

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57. Zuckert notes that the natural executive power of all in the state of nature to punish not only actual offenses, but intended ones as well, on behalf not only of oneself, but also on behalf of the whole law of nature, which sanctions the preservation of all mankind “makes Locke’s law of nature nearly indistinguishable from Hobbes’ right of nature.” He adds: “The violent and unacceptable character of the state of nature follows as much from the use of rightful force as from the use of unlawful force. Indeed, under the conditions of the state of nature, the difference between the two becomes exceedingly difficult to ascertain, for the law of nature in effect sanctions preemptive strikes against those in whom one has “discovered enmity.”...The law of nature, via the natural executive power, validates an extensive right to harm others. Contrary to the initial impression, there will be much violence in the state of nature, much, perhaps most of it morally allowable under the law of nature. Given all the force used in the state of nature, it is not so clear how different Locke’s version of the natural condition is from Hobbes’s.” (p. 236)

58. See Robert A. Goldwin, “John Locke,” *History of Political Philosophy, Third Edition* ed. Leo Strauss and Joseph Cropsey (Chicago: University of Chicago Press, 1987), p. 483.



the existing anarchy, since as Locke acknowledges, men are so prone to “ill nature, passion and revenge” that “will carry them too far in punishing others.” (II.13)

Thus mankind, notwithstanding all the privileges of the state of nature, being but in an ill condition, while they remain in it, are quickly driven into society . . . The inconveniences that they are therein exposed to, by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek *the preservation of their property*. (IX.124)

Government, then, exists not so much to preserve the natural community of men as to preserve the autonomous individual that the law of nature was supposed to protect. And if the individual is such a poor judge in upholding the natural law, Locke says, we can hardly expect a monarch, who is but a man, to do much better. Because men perform so poorly their right to execute the law of nature, the best government will consist of more than one person and be representative:

The first and fundamental positive law of all common-wealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good of every person in it. This legislative is not only the supreme power of the common-wealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that, which is absolutely necessary to its being a law, the consent of the society. (XI.134)

The definition of law has come a long way from that provided by Thomas, for whom the fundamental precept of natural law was to do good and avoid evil. Of course, the very terms “good” and “evil” evoked an entire moral universe that could not be

separated from the question of natural law. The most important fact in the view of the ancients and the Christian philosophers was that natural right or natural law ultimately pointed man beyond temporal society; earthly peace was both a by-product of and a means to union with the transcendent. Grotius sought a definition of natural law more descriptive than prescriptive, and thus concluded the natural law was whatever preserved man's status as a reasonable and sociable being. Human reason, and not objective truth, thus became the measure of law. It is in his work that we first find the rejection of end for process; for he defines evil as whatever is not reasonable. In Locke, we see the logical outcome of placing process over truth: The legislature (as the chosen and appointed will of the people) now takes the place of natural law, insofar as it stands as the measure of civil laws. What gives the law its validity, then, is not truth, but rather, consent. The essence of law is not, as per Thomas, in its formal cause (a combination of its structure and its purpose) or its end, a la Grotius, but, as Locke set forth in the *Questions*, in its *source*. And as suggested in both the *Questions* and the *Second Treatise*, the real source of law is not God, but the will of the people. The essence of law lies not in what it points to (its end) but rather, in the process by which it comes about. And the law exists by virtue of the legislature, which, by definition exists for the preservation of the people.<sup>59</sup> And yet, like Grotius, Locke seems eager to seek support for his untheistic variant of natural law in the will of God:

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59. See Zuckert, pp. 234-24: "Thomists affirm that human beings are destined by nature for social and political life, because the dictates of the natural law -- the natural virtues and vices, the natural perfections -- include and require social existence, which in turn includes political life. Secondly, the Thomist position affirms the naturalness of the political, in the sense that it has a reality beyond the sum of its parts...by contrast, Locke treats the political as artificial and therefore lacking a nature in the full sense.. Locke's political philosophy...is purely reductionist, in that it looks at the political in terms of

Thus the law of nature stands as an eternal rule to all men, *legislators* as well as others. The *rules* that they make for other men's actions, must, as well as their own and other men's actions, be conformable to the law of nature, *i.e.* To the will of God, of which that is a declaration, and the *fundamental law of nature being the preservation of mankind*, no human sanction can be good, or valid against it. (XI.135)

The law of nature represents God's will, and God's will is the preservation of mankind. Thus Locke joins Grotius in lowering the ends of government and providing a theological justification for this that denies the fall. Unlike the abundant gardens presented in Genesis, in Locke's theology, God does not provide an abundance but only the very raw materials by which man ekes out an existence by the sweat of his brow. The exodus from the state of nature is not a fall from God (whose will Locke equates with the law of nature), but more like an escape from the consequences of living according to that law. The very idea that there is something inherently *unnatural* in human society presupposes a hostile world.<sup>60</sup> Furthermore, when we speak of rights, it is worth noting that one never claims a "right" to something unless one's enjoyment of it is threatened. The very language of natural rights, then as opposed to natural law, presupposes a universe that is not safe and that there is also something inherently evil about humans, or at least, about humans in society. The implication seems to be that we

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what rational human beings would construct, on the basis of the thought that the political must be reduced to the sum of the wills of its members. Locke's executive power, in other words, is so much different from the Catholic Thomists' conception that it signifies a shift in the very roots of the respective philosophies."

60. See Zuckert, p. 229: "Locke's executive power of the law of nature is an emblem within his philosophy of his rejection of the central premise of the Thomist political philosophy -- the naturalness of the political, and thus the direct provision for political authority by nature or natural law...Locke's transcendent natural law does not rely on natural inclinations in order to establish nature's mandate. Locke doubts that natural inclinations account for political life for at the center of political life is coercion -- the power of punishment (II 3) . Political life must somehow go against the grain of human beings if violence is its defining character."

cannot really develop unless we are left alone. In this sense, the universal human rights must be whatever is most conducive to our being alone – self-preservation requires liberty.

Locke says the law of nature is the law of reason, but if the primary law of nature is preservation, then reason is useful only insofar as it aids our preservation; it is not to be cultivated as an end in itself.<sup>61</sup> The law of nature -- reason -- is thus derivative of rights, as opposed to being the source of rights. This is a dramatic reversal of the classical and Christian order of truth to society. For Plato, Aristotle and the Christian tradition, the existence of objective truth was a critical element in understanding human being. The ancient/medieval traditions held that human happiness comes from imitating, or uniting ourselves, to the Good. Truth, or God, is pure reason -- or soul -- but human beings have bodies as well as souls, and the body is the primary obstacle to achieving union with truth. Now, at least for Aristotle and Thomas Aquinas, this does not mean that the body and all its inclinations are bad; but to remain good, we must keep our will and our passions properly in check. Natural law provided the guidelines for human beings in achieving their place in the eternal plan. Ultimately, then, God or nature is good; evil comes only from the misuse of creation. The chief obstacle to human happiness then, is ourselves and our own failings.

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61. See Rahe, p. 269: Reason “may guide man in his ‘pursuit of happiness.’ Or, to be more precise, it may direct him in his headlong flight from discomfort and death. But enslaved as it is to passions that know no bounds, it lacks an erotic divination of the good, and it can therefore play no direct role in determining his ultimate aim. Reason validates man’s natural inclination toward the ‘comfortable preservation’ of his being by surrendering to it.”

For Locke, God is ultimately irrelevant to a meaningful human life. God may have created us, but He is not providential -- He supplies us with only very raw material, which we must labor heavily over in order to survive. Our primary goal is not union with God, or truth, but rather, our own preservation. Survival has become our main preoccupation. If survival is the highest end, the focus shifts from the mind to the body; for there is no need to cultivate reason for its own sake, because man is no longer striving for an end beyond his own existence.<sup>62</sup> Reason is valuable insofar as it is an instrument for achieving our interests. The chief obstacle to our happiness now is not our own inner, moral failure, but rather, other people and their interference with our self-preservation. The outcome of Locke is the realization that the solution to the human dilemma is not to be found in the inner recesses of the soul, but in the outer structure of social institutions. Modern man is no longer considered to be a social creature whose identity is defined by his relation to another, but a solitary being caught in the cruel vice grip of requiring for his survival the same people who pose the greatest threats to it. The path to happiness no longer consists in a well-ordered soul, but in an artificial society of well-ordered structures, created by man for the purpose of being left alone.

So we find that the epistemological failure of contemporary human rights is not the result of an erroneous reading of Locke, but simply the inevitable outcome of the

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62. See Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), p. 250: "The primary fact is want. But this want, this lack, is no longer understood as pointing to something complete, perfect, whole. The necessities of life are no longer understood as necessary *for* the complete life, or the good life, but as mere inescapabilities . . . The goal of desire is defined by nature only negatively -- the denial of pain . . . It is this pain, and hence a defect, which gives man originally the most important of all rights: sufferings and defects, rather than merits or virtues, originate rights."

chain of ideas set in motion by Grotius in the attempt to establish a natural law untethered from the anchor of truth. The very concept of natural rights, ironically, stems from a worldview that is unlikely to inspire the altruism necessary to uphold such rights. Universal human rights, at their best, represent the enduring principles of human dignity and freedom; principles which continually evade our grasp as they bob about in a world still reeling from the tidal wave of modernity. In such a world we may find that the surest beacon of hope is that which still remains on the shore from which Machiavelli so cavalierly embarked. Perhaps it is time to moor our storm-tossed ship in the natural law philosophy of Thomas Aquinas. Perhaps we are finally ready to acknowledge that sometimes, to progress is to return.

## **Chapter 4:** **Being and Goodness: The Alpha and Omega of Human Rights**

*If I am to discuss what is wrong, one of the first things wrong is this: the deep and silent modern assumption that past things have become impossible. There is one metaphor of which the moderns are very fond; they are always saying "You can't put the clock back." The simple and obvious answer is "You can." A clock, being a piece of human construction, can be restored by the human finger to any figure or hour. In the same way society, being a piece of human construction, can be reconstructed upon any plan that has ever existed.*

*– G.K. Chesterton from "What's Wrong with the World"*

Our examination of the changing relationship between principle and politics has revealed that the language of "rights" grows out of a worldview that refuses to acknowledge objective standards of "right." Despite this, the concept of universal human rights presupposes that all human beings are entitled to a certain moral respect that does not depend on the will of governments or individuals. Regardless of the philosophical origins of rights terminology, universal human rights today are understood to represent nonderogable principles of human dignity. Modernity has not satisfied man's deepest yearnings; it has merely robbed him of the ability to understand and express them. This point was especially evident in Chapter 1, where we saw that most of the attempts to explain the meaning of human dignity and thence the universality of human rights are logically flawed insofar as they hold autonomy to be the ultimate end of human being. Making human will the highest attainable good precludes the ability to discern the first principles of morality that are required for universality. It also creates practical difficulties for the enforcement of human rights

since, based on the logic of this position, there is no reason to rank any particular right of greater importance than all the others. Worse still, it opens the door to a kind of tyranny wherein the full benefit of human rights extends only to those who are fully autonomous and hence fully “human.”

The autonomy view of human dignity is the logical outcome of modern political philosophy’s reaction to the “theologico-political” problem presented by Christianity. In an attempt to offer a theory of politics apart from revealed truths, modern philosophy rejected the idea of an objective good for human beings in favor of a politics based on the “low but solid” ground of the practical concerns of life.

This did not have the effect of quenching man’s innate thirst for transcendence, but resulted instead in the replacement of the traditional understanding of first principles with a new set, based on a secular humanism that elevates the principle of autonomy to the level of the sacred. The task of this chapter is to return to the foundational basis of the good rights are supposed to protect. We cannot speak of universal rights if there is no universal human nature to which such rights attach. In turn, we cannot speak of universal human nature if there is no single end for human beings. To speak about universal human rights in a way that is logically consistent requires a return to the first principles that informed classical philosophy. Let us therefore turn to the work of Thomas Aquinas, who provides a comprehensive explanation of human nature and law based on the assumption that the universe is ordered. From there, we will discuss in further depth a point that was initially made in Chapter 1: If human rights are to have any meaning at all, there cannot be a human “right” to abortion.



## The Need for a Foundational Approach

Chapter 1 witnessed the folly of arguments that attempt to ground universal rights in the concept of autonomy rather than natural law. In his book *Human Rights as Politics and Idolatry*, Michael Ignatieff seems to recognize the danger of making rights an end in themselves, or in expecting them to accomplish all the things that human rights documents set out to do. He wants to expound a practical theory of universality, based on what we can realistically expect human rights to accomplish. His “thin” universalism in many ways affirms the principles of natural law set forth by St. Thomas. Ignatieff, however, believes that practicality requires that we eschew “foundational” principles. But as with all other non-foundational theories of universality, this, too, opens the door to the forces of tyranny. What is interesting about Ignatieff is that more he tries to argue against universal principles as the basis of human rights, the more convincingly does he, unwittingly, make the case for a return to natural law.

We might say that there are two main components to Ignatieff’s argument: an explanation of what human rights are, and an account of where they come from. He begins by noting, as we did in Chapter 1, that the Universal Declaration of Human Rights was really a reaction to the effects of nihilism as represented by Nazi Germany; a “return by the European tradition to its natural law heritage, a return intended to restore *agency*, to give individuals the civic courage to stand up when the state ordered them to do wrong.”<sup>1</sup> He explains that “The most essential message of human rights is that there are no excuses for the inhuman use of human beings.” The important

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1. Ignatieff, Michael, *Human Rights as Politics and Idolatry*, (Princeton: Princeton University Press, 2001), 5.

function of human rights is “to provide a universalist vantage point from which to criticize and revise particularistic national law.”<sup>2</sup> The chief purpose of rights, then, is to provide a means by which individuals can stand up for themselves in the face of government injustice.

Just as natural law holds that there are first principles of justice which are general and universal, and secondary principles which represent the application of these to specific situations, Ignatieff suggests that the Universal Declaration of Human Rights offers a universal standard which, to some degree, must be permitted to be interpreted freely among different cultures. Nevertheless, human rights in practice must be consistent with the principles they represent. Thus, since “individual agency” is a key component of human rights, groups must be free, as far as possible, to rule themselves; it would go against the nature of human rights for some governments to impose them on others.<sup>3</sup> But just as natural law holds that the interpretation of secondary principles must not conflict with their meaning on the primary level, “only in strictly defined cases of necessity – where human life is at risk – can coercive human rights interventions be justified.”<sup>4</sup> This implies that all human rights are not of equal importance, and that life is more fundamental than liberty. Next to life, the paramount fact human rights must respect is that human beings are free agents. As such, nations should not be expected to adhere to the long list of rights enumerated within the UN human rights documents, but should be free to decide when and how to implement human rights.

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2. Ibid., 16.  
3. Ibid., 18.  
4. Ibid., 18.

(Human rights provide) an account of what is right, not an account of what is good. People may enjoy full human rights protection and still believe that they lack essential features of a good life. If this is so, shared belief in human rights ought to be compatible with diverging attitudes concerning what constitutes a good life . . . Another way of putting the same thought is that people from different cultures may continue to disagree about what is good, but nevertheless agree about what is insufferably, unarguably wrong . . . Human rights can command universal assent only as a decidedly “thin” theory of what is right, a definition of the minimum conditions for any kind of life at all.<sup>5</sup>

Ignatieff is wisely on guard against the dangers that occur when rights are made an end in themselves. Recognizing that “all forms of power are open to abuse, and there is no reason why power that legitimizes itself in the name of human rights should not end up as open to abuse as any other,”<sup>6</sup> he warns against the tendency to make human rights a secular religion, which turns it “into a species of idolatry: humanism worshipping itself.”<sup>7</sup> So far, this is in line with the argument advanced in Chapter 1, that the current arguments for human rights, grounded in secular humanism, are conducive to tyranny.

But rather than attempting to rethink the idea of human dignity to determine what makes human rights universal, Ignatieff turns away entirely from dignity as a source of human rights.<sup>8</sup> The problem with grounding human rights on dignity, he believes, is that human beings often don’t act with dignity. He denies that there is any natural human attributes that can serve as a basis for universality. We cannot seek reason as a guide, he contends, for the “exterminatory nihilism of the Nazis”

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5. Ibid., 56.  
6. Ibid., 47.  
7. Ibid., 53.  
8. Ibid., 54.

demonstrated that “any ethics that takes only reason for its guide is bound to seem powerless when human reason begins to rationalize its own exterminatory projects.”<sup>9</sup>

Nor can we look to empathy as a basis for rights, he says, for in actual experience, human beings are not naturally disposed to be concerned for others outside of their immediate circle. “The Holocaust showed up the terrible insufficiency of all the supposedly natural human attributes of pity and care in situations where these duties were no longer enforced by law. . . the Universal Declaration set out to reestablish the idea of human rights at the precise historical moment in which they had been shown to have had no foundation whatever in natural human attributes.”<sup>10</sup>

A more realistic and therefore more universal way to ground human rights, Ignatieff believes, is to look not to any theory of human nature, but rather to the lessons of history:

(History teaches) that human beings are at risk of their lives if they lack a basic measure of free agency; that agency itself requires protection through internationally agreed standards, that these standards should entitle individuals to oppose and resist unjust laws and orders within their own states; and finally, that when all other remedies have been exhausted, these individuals have the right to appeal to other peoples, nations, and international organizations for assistance in defending their rights. These facts . . . have been demonstrated most clearly in the catastrophic history of Europe in the twentieth century.<sup>11</sup>

Such a historical conception of human rights, Ignatieff argues, does not need to appeal to principles of nature or dignity. He explains:

We must work out a belief in human rights on the basis of human beings as they are, working on assumptions about the worst we can do, instead

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9. Ibid., 81.  
10. Ibid., 79-80.  
11. Ibid., 55.

of hopeful expectations of the best. In other words, we do not build foundations on human nature but on human history, on what we know is likely to happen when human beings do not have the protection of rights. We build on the testimony of fear, rather than on the expectations of hope.<sup>12</sup>

Apparently, Ignatieff believes history provides a more “neutral” basis for human rights, since he assumes that everyone can agree on what has already happened. He says that theories that ground rights in human dignity, however, are controversial “because each version of them must make metaphysical claims about human nature that are intrinsically contestable . . . Foundational claims of this sort divide, and these divisions cannot be resolved in the way humans usually resolve their arguments, by means of discussion and compromise”<sup>13</sup> This is why, although he has previously described human rights as upholding a kind of moral standard, Ignatieff is quick to assert that rights must not be thought of as “trumps,” for this notion (wrongly) implies that “when rights are introduced into a political discussion, they serve to resolve the discussion. In fact,” he says, “the opposite is the case. When political demands are turned into rights claims, there is a real risk that the issue at stake will become irreconcilable, since to call a claim a right is to call it nonnegotiable, at least in popular parlance.”<sup>14</sup>

Ignatieff explains the struggle that exists between religious believers and secularists regarding the nature of human rights. He says that religious believers think that unless one acknowledges that human beings are sacred, there is no special reason

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12. Ibid., 80.

13. Ibid., 54.

14. Ibid., 20.

for protecting them with rights<sup>15</sup> In order to be consistent, humanists, or non-believers, must reply that “there *is* nothing sacred about human beings”:

(Human rights are) necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical. Human rights is the language through which individuals have created a defense of their autonomy against the oppression of religion, state, family and group . . . To be a rights-bearer is not to hold some sacred inviolability but to commit oneself to live in a community where rights conflicts are adjudicated through persuasion, rather than violence . . . The fundamental moral commitment entailed by rights is not to respect, and certainly not to worship. It is to deliberation . . . for the purpose of finding compromises that will keep conflicting claims from ending in irreparable harm to either side.<sup>16</sup>

Ignatieff implies that because religious believers hold “moral absolutes,” they cannot make any contribution to the case for universal human rights, since, in his view, moral absolutes preclude dialogue. The view of the humanists appears to be more compatible with his “thin” theory of universalism, for it makes no assumptions about human beings as rational, empathetic, or children of God. It holds only that they have a right to deliberate about their treatment of each other. But where does *this* right -- the right to deliberate -- come from? What Ignatieff seems not to realize is that a moral commitment to “deliberation” inherently assumes that people are “sacred” if by that word we are to mean that they are entitled to be treated as moral equals. For to say that someone has a right to “deliberate” is to presume that there is something about that person that is worthy of respect quite apart from our particular feelings about him and whether or not we feel like listening.

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15. Ibid., 82.

16. Ibid., 84.

Ignatieff, unwittingly confirms this point when he looks to the writings of Primo Levi, a secular Jew and Holocaust survivor, as “exemplary testimony to the capacity of secular reason to describe the enormity of evil.”<sup>17</sup> He cites a passage from Levi concerning the way he was looked at by a Nazi chemist:

That look was not one between two men; and if I had known how completely to explain the nature of that look, which came as if across the glass window of an aquarium between two beings who live in different worlds, I would have also explained the essence of the great insanity of the third German (reich).<sup>18</sup>

Ignatieff sees this as an example of the moral intuition that human rights are designed to embody – that “our species is one, and each of the individuals who compose it is entitled to equal moral consideration.”<sup>19</sup>

Here is where Ignatieff’s appeal to history as the basis of human rights begins to break down. For Levi said that the great evil of the Nazis lay in their refusal to see the Jew as a fellow human being. But the humanist, according to Ignatieff, must admit that there is nothing special about human beings – only that there is less suffering if people can effectively protest against government injustice. But was the essence of Levi’s charge that he had no way to protest injustice, or that it was terribly wrong for the Nazi’s to deny the essential moral worth of the Jew? Ignatieff may look to Levi for the “secular” viewpoint, but the fact is that regardless of whether or not one acts from consciously religious motives, anyone who lives by the principle that *all* human beings

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17. Ibid., 86.  
18. Ibid., 3.  
19. Ibid., 3-4.

deserve equal moral consideration confirms the case of the believers – that human beings are sacred.

We might also question how well Ignatieff's explanation of deliberation as the function of human rights works in the absence of foundational principles. He suggests that human rights should be understood "as a language, not for the proclamation and enactment of eternal verities, but as a discourse for the adjudication of conflict." Rather than moral absolutes, rights are better thought of as tools to create a "common framework, a common set of reference points that can assist parties in conflict to deliberate together."<sup>20</sup> If rights are trumps, they assume the status of moral absolutes. Ignatieff realizes the absurdity of assigning such value to all of the goods held out by human rights documents, a move which ultimately forces more conflict than cooperation among world actors. The idea that rights are tools, and not trumps is useful if we acknowledge that there are few human goods that are truly universal – that is, applicable in all times and in all situations. Ignatieff, however, wants to say that we should be able to employ rights as tools without assuming there are any shared universal values. If that is the case, then it is wrong to suppose that any dialogue can occur at all. Ignatieff's own words reveal the inadequacy of this view:

Common language, however, does not necessarily facilitate agreement. In the American abortion debate, for example, both sides agree that the inhuman use of human life should be prohibited, and that human life is entitled to special legal and moral protections. Yet this is hardly common ground at all, since the two sides disagree as to when human life commences, and as to whether the claims of the mother or the unborn child should prevail . . . it is an illusion to suppose that the function of human rights is to define a higher realm of shared moral

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20. Ibid., 20.



values that will assist contending parties to find common ground. Broad evaluative consensus about human rights may be a necessary condition for deliberative agreement, but it is not a sufficient one. Other political factors are essential for closure: shared exhaustion with the conflict, dawning mutual respect, joint mutual recognition – all these must be present, as well as common commitment to moral universals, if agreement is to be reached.<sup>21</sup>

So human rights should provide us with a common language for dealing with conflicts, but in the case of abortion, a common language “does not necessarily facilitate agreement.” Ignatieff initially claims that the chief function of human rights is to facilitate discussion, but he then admits that in the more contentious situations, conversation is impossible without a “common commitment to moral universals.” Ignatieff seems to have made the opposite point of what he intended: He may prefer to think of human rights not as moral trumps, but in a more humble fashion, simple talking points. Yet unless the concept is anchored in universal truths, it cannot perform even that less exalted role.

As was shown in Chapter 1, the very existence and function of language indicates that human beings are moral by nature - we think and act in terms of universal rights and wrongs. We cannot coherently hold that the idea of human rights is by nature a dialogue but does not by nature represent universal values. The second statement is implicit in the first. For if there was no possibility of agreement on moral matters, there would be no point in talking at all. Disagreement should not mean the end of dialogue, but rather, a more concerted effort to return to the premises of our own arguments.

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21. Ibid., 21.

Ignatieff asks “Why do we need an idea of God in order to believe that human beings are not free to do what they wish with other human beings; that human beings should not be beaten, tortured, coerced, indoctrinated, or in any way sacrificed against their will? These intuitions derive simply from our own experience of pain and our capacity to imagine the pain of others . . . indeed the strength of a purely secular ethics is its insistence that there are no “sacred” purposes that can ever justify the inhuman use of human beings.”<sup>22</sup> But this is an appeal to sentiment as a foundation of rights, which Ignatieff has already discounted. Besides, if we are to justify actions solely on the basis of whether we want to be on the receiving end, and maintain, as the secularist must, that there is nothing special about human beings, then we must consider animals and plants as our moral equals.

So human rights cannot be used as tools for dialogue without some prior stipulation of foundational principles. Neither can they be justified by the so-called “neutral” standard of history, for looking to history as a standard is useless at best and dangerous at worst. Without independent standards of judgment, how are we to interpret the lessons of history in the first place? The “lessons” of history can always be rewritten; the first principles of justice are unchanging. Making history a foundation for rights assumes that we must wait for terrible things to happen before we are capable of making judgments. The horrors of Nazi Germany may have opened the eyes of the world to the existence of evil in a way that nothing had before, but how do we know that this is the worst that human beings can produce? A final problem with making

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22. Ibid., 88.

history the criteria for forming moral judgments is that history can be subjective -- if we cannot judge historical events against the backdrop of moral verities, who is to say what history teaches? Or, if we are to remember the horrific world of Orwell's *1984*, in which all accounts of history are continually rewritten by agents of a totalitarian government, who is to say that history even happened? In order to remain intelligible, Ignatieff's theory of human rights as a means of dialogue requires a much greater reliance on universal moral principles than he wishes to admit.

Ignatieff's analysis of human rights in many ways points to the concept of natural law – in his argument that secular humanism cannot stand as the measure of human rights without collapsing into “idolatry” or “humanism worshiping itself,” and in the idea that the truly universal values are not represented by the whole catalogue of human rights, but comprise a much smaller list of obligations revolving around negative liberties. He has come, perhaps, closer than any thinker examined heretofore to illuminating the reality of human rights in international politics. He provides a sound and sober analysis of the possibilities and limitations of universal human rights. But his view is ultimately flawed, insofar as he shies away from the notion that if human rights are universal, it is because they are rooted in universal moral principles. Instead, Ignatieff holds that we know universal human rights solely on the basis of the lessons of history. But the problem with the historical justification is that it makes the interpreters of history the sole guarantors of truth. It also carries with it the notion that we control truth simply by virtue of our place in time. This has the effect of confining truth to the subjective realm of the human mind. Thus, Ignatieff's approach to human rights, like

any other that eschews the idea of transcendent standards of justice, runs the risk of degenerating into the will of the stronger, as those with the power to control historical interpretation determine what the lessons of history are, and how they should be applied.

### **Dignity in the Breach: The Human Being and the Concentration Camp**

If universality is to have any meaning at all, it must be rooted in principles that do not depend for their existence on human opinions or beliefs, which can change with the times. If human beings universally possess a certain dignity, it is only because there are immutable facts about human nature. Ironically, it is in the writing of concentration camp survivor Primo Levi, Ignatieff's secular champion, that we find a very powerful testimony to this fact. While Levi is an avowed non-believer, his work affirms that objective moral principles exist and make a difference to human beings.

It is widely acknowledged that the Holocaust, which, in the words of the Universal Declaration of Human Rights, "shocked the conscience of mankind," was the chief impetus to the recognition of international human rights. But what made the Holocaust such an exceptional affront to the principle of human dignity? Levi's writings indicate that the real malignity of the Holocaust was not in the number of lives it claimed, but in the way that it deprived an entire ethnic population of the essence of their humanity by eradicating their ability to reason and to act according to moral principles.

Levi explains that the first step in the process of obliterating one's humanity was to strip him, not just of his clothing, hair and personal effects, but of his ability to use

language. Prisoners were deliberately kept in a state of ignorance as to what was occurring to them. “If we speak, they will not listen to us, and if they listen, they will not understand.”<sup>23</sup>

This ‘not being talked to’ had rapid and devastating effects. To those who do not talk to you, or address you in screams that seem inarticulate to you, you dare not speak . . . If you are fortunate enough to have next to you someone with whom you have a language in common, good for you, you’ll be able to exchange your impressions, seek counsel, let off steam, confide in him; if you don’t find anyone, your tongue dries up in a few days, and your thought with it.<sup>24</sup>

Drowning in a sea of unintelligible language, Levi remembers, the inherent need for communication manifested in his ability, even forty years later, to remember meaningless phrases from languages he didn’t know – “the mental equivalent of our bodily need for nourishment, which drove us to search for potato peelings around the kitchens: little more than nothing, better than nothing.”<sup>25</sup> Prisoners tried to save themselves, “some by begging for shreds of information; some spreading without discernment triumphant or disastrous information, true, false, or invented; some who sharpened eyes and ears to seize and try to interpret all signs offered by men, the earth, and the heavens.” Cut off from their families, and countries of origin, prisoners were deprived of communication with the external world as well.<sup>26</sup>

Contrasting the brutal and course German spoken in the Lager in contrast with proper German Levi notes that “it is an obvious observation that where violence is

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23. Levi, Primo, *If This is a Man: Remembering Auschwitz* (New York: Summit Books, 1986), 15.

24. Levi, Primo, *The Drowned and the Saved*, trans. Raymond Rosenthal (New York: Summit Books, 1988), 93.

25. *Ibid.*, 95.

26. *Ibid.*, 101-2.

inflicted on man it is also inflicted on language.”<sup>27</sup> We might say that the converse is also true -- that where violence is inflicted on language, it is inevitably inflicted on mankind, because our capability for language is essential to our humanity. It is through language that we reason, form judgments, bond with others and make sense of the world. Language, in other words, confirms what Aristotle would call our *telos* – our end as rational, social creatures.

As the philosopher Josef Pieper points out, “word and language form the medium that sustains the common existence of the human spirit as such . . . And so, if the word becomes corrupted, human existence itself will not remain unaffected and untainted.”<sup>28</sup> He explains:

Human words and language accomplish a two-fold purpose . . . First, words convey reality. We speak in order to name and identify something that is real, to identify it for *someone* of course – and this points to the second aspect in question, the interpersonal character of human speech. . . The one (aspect) does not exist without the other . . . we may well presume that such and such is simply a factual reality and that all we want is to understand this reality and, of course, describe it. Right: describe it – but to whom? The other person is already in the picture; what happens here is already communication. In the very attempt to know reality, there already is present the aim of communication.<sup>29</sup>

The degradation . . . of man through man, alarmingly evident in the acts of physical violence committed by all tyrannies (concentration camps, torture), has its beginning . . . at that almost imperceptible moment when the word loses its dignity. The dignity of the word, to be sure, consists in this: through the word is accomplished what no other means can accomplish, namely, communication based on reality.<sup>30</sup>

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27. Ibid., 97.

28. Pieper, Josef, *Abuse of Language – Abuse of Power*, trans. Lothar Krauth (San Francisco: Ignatius Press, 1992), 15.

29. Ibid., 15.

30. Ibid., 33.

Language confirms that we are intrinsically connected to both a reality outside ourselves and to our fellow man. When the word loses its dignity, we lose our sense of reality and community. Levi echoes this sentiment when he notes that failure to suffer from the deprived state of communication, but “to accept the eclipse of the word, was an ominous symptom: it signaled the approach of definitive indifference.”<sup>31</sup>

This leads to the next step in the assault on the prisoners’ humanity, for in their degradation, they are prevented from being able to make sense of things, and therefore, the ability to act morally. Levi notes that “the conviction that life has a purpose is rooted in every fibre of man, it is a property of the human substance.”<sup>32</sup> In the Lager, however, men were stripped of any chance to make sense of life. They were deliberately denied the most simple necessities -- like the spoons that were so essential to consuming the watery broth that served as their only source of nourishment -- and placed in a state of such complete oppression that simple survival demanded that they steal from each other. They were left in such a perpetual state of cold, exhaustion and hunger that they were literally incapable of focusing on anything other than the present moment. “The deprivation to which (prisoners) were subjected led them to a condition of pure survival, a daily struggle against hunger, cold, fatigue and blows in which the room for choices (especially moral choices) was reduced to zero.”<sup>33</sup> Therefore, Levi adds, “in the Lager there are no criminals nor madmen; no criminals because there is no

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31. Levi, *The Drowned and the Saved*, 101.

32. Levi, *If This is a Man*, 52.

33. Levi, *The Drowned and the Saved*, 49-50.

moral law to contravene, no madmen because we are wholly devoid of free will, as our every action is, in time and place, the only conceivable one.”<sup>34</sup>

One has to fight against the current, to battle every day and every hour against exhaustion, hunger, cold and the resulting inertia; to resist enemies and have no pity for rivals, to sharpen one’s wits, build up one’s patience, strengthen one’s will-power. Or else, to throttle all dignity and kill all conscience, to climb down into the arena as a beast against other beasts . . . Many were the ways devised and put into effect by us in order not to die . . . Survival without renunciation of any part of one’s own moral world – apart from powerful and direct interventions by fortune – was conceded only to very few superior individuals, made of the stuff of martyrs and saints.<sup>35</sup>

Levi concludes that far from sanctifying its victims, National Socialism, to the contrary, “degrades them, it makes them resemble itself, and this all the more when they are available, blank, and lacking a political or moral armature.”<sup>36</sup> Thus, one of the greatest affronts to humanity was that survival in many cases required one to renounce the behavior that ordinary morality would require.

The breakdown of language signals the breakdown of community. Because the prisoners were deprived of language, the harshness of life in the camps had an even more deleterious effect, for it only reinforced the fact that the prisoners were utterly alone:

The enemy was all around but also inside, the ‘we’ lost its limits, the contenders were not two, one could not discern a single frontier but rather many confused, perhaps innumerable frontiers, which stretched between each of us. One entered hoping at least for the solidarity of one’s companions in misfortune, but the hoped for allies, except in special cases, were not there; they were instead a thousand sealed off monads, and between them a desperate covert and continuous struggle.

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34. Levi, *If This is a Man*, 73.

35. *Ibid.*, 69.

36. Levi, *The Drowned and the Saved*, 40.



This brusque revelation . . . was so harsh as to cause the immediate collapse of one's capacity to resist.<sup>37</sup>

The war of all against all that was forced by conditions in the concentration camp had as part of its aim the utter loneliness of the prisoners. Levi explains that the isolation experienced in the Lager is not found in ordinary life, where man seldom loses himself because he is never totally alone:

Everyone is normally in possession of such spiritual, physical and even financial resources that the probabilities of a shipwreck, of total inadequacy in the face of life, are relatively small. And one must take into account a definite cushioning effect exercised both by the law, and by the moral sense which constitutes a self-imposed law; for a country is considered the more civilized the more the wisdom and efficiency of its laws hinder a weak man from becoming too weak or a powerful one too powerful.<sup>38</sup>

But in the Lager things are different: here the struggle to survive is without respite, because everyone is desperately and ferociously alone. If some Null Achtzehn vacillates, he will find no one to extend a helping hand; on the contrary, someone will knock him aside, because it is in no one's interest that there will be one more 'musselman' (word used to describe the "weak, the inept, those doomed to selection) dragging himself to work every day; and if someone, by some miracle of savage patience and cunning, finds a new method of avoiding the hardest work, a new art which yields him an ounce of bread, he will try to keep his method secret, and he will be esteemed and respected for this, and will derive from it an exclusive, personal benefit; he will become stronger and so will be feared, and who is feared is, ipso facto, a candidate for survival.<sup>39</sup>

It is important to note that although conditions in the camp resemble the Hobbesian state of nature, Levi never assumes that this is man's natural state – indeed,

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37. Ibid., 38.

38. Levi, *If This is a Man*, 65.

39. Ibid., 65-66.

the very injustice of the whole thing is rooted in the fact that man has been reduced to conditions that are subhuman. Stripped of the ability to communicate and alienated from his fellow man, the prisoner is unable to make sense of the world. Survival itself often hinged on a willingness to ignore the ordinary rules of morality. Those who do not survive, are “drowned”:

(They) are overcome before they can adapt themselves; they are beaten by time, they do not begin to learn German, to disentangle the infernal knot of laws and prohibitions until their body is already in decay, and nothing can save them from selections or death by exhaustion. Their life is short but their number is endless, they, the . . . drowned, form the backbone of the camp, an anonymous mass, continually renewed and always identical, of non-men who march and labour in silence, the divine spark dead within them, already too empty to really suffer. One hesitates to call them living: one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand . . . if I could enclose all the evil of our time in one image, I would choose this image . . . An emaciated man, with head dropped and shoulders curved, on whose face and in whose eyes not a trace of a thought is to be seen.<sup>40</sup>

The great evil of the Holocaust, then, lies not simply in hunger, exhaustion, or even death, but in reducing men to beasts insofar as they can no longer think for themselves, or make sense of the world. It lies in making men utterly empty inside, going to their deaths like dogs, with no awareness that death means anything at all.

Finally, we should note that the concentration camps usually caused the prisoners to give up all hope, which is itself an elemental aspect of human nature. In fact, Levi credits his very survival to Lorenzo, a civilian who took pity on him – giving him food, and sending some letters for him:

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40. Ibid., 67.

I believe it was really due to Lorenzo that I am alive today; and not so much for his material aid, as for his having constantly reminded me by his presence, by his natural and plain manner of being good, that there existed a just world outside our own, something and someone still pure and whole, not corrupt, not savage, extraneous to hatred and terror; something difficult to define, a remote possibility of good, but for which it was worth surviving. . . Lorenzo was a man; his humanity was pure and uncontaminated, he was outside this world of negation. Thanks to Lorenzo, I managed not to forget that I myself was a man.<sup>41</sup>

Levi may consider himself a non-believer, but in fact he comes forth more as one who is angry with God than as one who does not believe. He says that “if for no other reason than that an Auschwitz existed, no one in our age should speak of Providence.”<sup>42</sup> Yet, he admits that providence was not far from his mind during the times when he narrowly escaped death. But this is not nearly as significant as the fact that Levi’s writing as a whole stands as testimony to the fact that there is such a thing as an order to be discerned and that human beings occupy a place and perform a role in that order. Levi relays a conversation he had with a Frenchman in which he tries to explain Dante’s *Divine Comedy*. Struggling under the pressure of crossing a language barrier within the very limited time that is afforded them to speak, Levi tries to convey the meaning of the poem. He is filled with a sense of urgency, and the conviction that it is absolutely essential to understand. He quotes:

“Think of your breed; for brutish ignorance  
Your mettle was not made; you were made men,  
To Follow after knowledge and excellence.”

As if I also was hearing it for the first time: like the blast of a trumpet,  
like the voice of God. For a moment I forget who I am and where I am.  
Pikolo begs me to repeat it. How good Pikolo is, he is aware that it is

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41. Ibid., 92.

42. Ibid., 120.

doing me good. Or perhaps it is something more: perhaps, despite the wan translation and the pedestrian, rushed commentary, he has received the message, he has felt that it has to do with him, that it has to do with all men who toil, and with us in particular . . . I must tell him, I must explain to him about the Middle Ages, about the so human and so necessary and yet unexpected anachronism, but still more, something gigantic that I myself have only just seen, in a flash of intuition, perhaps the reason for our fate, for our being here today.<sup>43</sup>

The Holocaust represents the logical outcome of the argument that the universe is not ordered. If neither God nor nature provides, life is ultimately senseless and unintelligible; everything is permitted. Levi may be nondenominational, but he is not secular, if by that word we are to mean someone who does not believe in transcendent standards. The very act of his writing is an attempt to make sense of things. Levi's ability to explain why Auschwitz was wrong is in essence a testimony to all that is right.

### **Being and Goodness: The Essence of Life and Law in the Philosophy of St. Thomas**

So far, we have seen that, despite all attempts to prove otherwise, the very idea of human rights is inextricably tied to the concept of morality – that is, to the idea that there are certain standards of right and wrong regarding the treatment of people that are independent from particular human opinions. If we are willing to admit that our very ability to converse with each other is itself evidence of at least some universal truth, perhaps we are ready to turn to St. Thomas to consider the significance of this truth for human life

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43. Ibid., 85-87.

*“Being” as the Fount and Fullness of the Good*

For St. Thomas, the whole of natural law can be summed up in the phrase that “good is to be done, evil is to be avoided.” While this sounds remarkably simple, the very notion of “good” opens up a lengthy discussion about the meaning of human nature and the subsequent framing of human laws. For Thomas, *being* is the foundation of all good. Something is more, or less good to the extent that it possesses fullness of being. The ultimate human good is happiness. The practice of virtue is an important component to the achievement of happiness. The purpose of law is, at root, to protect being -- since a good community requires good individuals. Let us see how Thomas goes through these steps to arrive at his exposition of natural law.

The *Summa Theologica* is broken down into three parts. Part I concerns the nature of God, and the procession of all creatures from God. Part II is the consideration first, of human acts generally, and second, of human acts specifically. Part III is a discussion of Christ as the way of all creatures back to God. The organization of these parts indicates that human beings originate from, and find their end, in God. Our examination will focus on Part II.

“Good is to be done. Evil is to be avoided.” Before he can discuss what is good for human beings, Thomas carefully examines the nature of good generally. He explains that *being* is the foundation for all goodness:

Goodness and being are really the same, and differ only in idea . . . The essence of goodness consists in this, that it is in some way desirable. Hence the Philosopher says (Ethics.i): Goodness is what all desire. Now it is clear that a thing is desirable only in so far as it is perfect; for all desire their own perfection. But everything is perfect so far as it is actual.

Therefore it is clear that a thing is perfect so far as it exists; for it is existence that makes all things actual. (I.q.5.a.1.c.)<sup>44</sup>

All things in existence, then, are good. But the existence of a thing is not complete, however, until the thing attains its perfection. Therefore, all things are in various states of becoming. “Hence, that which has ultimate perfection is said to be simply good; but that which has not the ultimate perfection it ought to have (although, in so far as it is at all actual, it has some perfection), is not said to be perfect simply nor good simply, but only relatively”(I.q.5.a.1.r.1) Being represents both the foundation and the fullness of goodness. Something is more, or less good to the extent that it has being. Thus:

Every being, as being, is good. For all being, as being, has actuality and is in some way perfect; since every act implies some sort of perfection . . . No being can be spoken of as evil, formally as being, but only so far as it lacks being. Thus a man is said to be evil because he lacks some virtue; and an eye is said to be evil, because it lacks the power to see well. (I.q.5.a.3.c.)

Being is good. Evil is simply a lack, in a privative sense, of being. So, for example, a man may lack a lion’s strength, but that is not an evil, for he lacks nothing that is proper to his nature. It would be an evil, however, for a man to be deprived of sight. “The form which makes a thing actual is a perfection and a good; and thus every actual being is a good; and likewise every potential being, as such, is a good, as having a relation to good. For as it has being in potentiality, so has it goodness in potentiality. Therefore, the subject of evil is good.”(I.q.48.a.3.c.)

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44. St. Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Bros., 1948). All references hereafter are to the *Summa Theologica*.

The agent, the form, and the end, import some kind of perfection which belongs to the notion of good. Even matter, as a potentiality to good, has the nature of good . . . it was shown that good is the subject of evil. But evil has no formal cause, rather it is a privation of form; likewise, neither has it a final cause, rather it is a privation of order to the proper end; since not only the end has the nature of good, but also, the useful, which is ordered to the end. Evil, however, has a cause by way of an agent, not directly, but accidentally. (I.q.49.a.2c.)

So something is more, or less good to the extent that it has being. For Thomas, everything in existence has a proper form and function -- a thing is perfectly good when it completely fulfills its form and function. A piece of a jigsaw puzzle, for example, possesses a particular form, by which it fulfills a particular function -- contributing to the finished product, which is a beautiful picture. The puzzle is good insofar as the placement of the pieces move it to its proper end. If they are put together properly, the result is a beautiful picture – if they are not, the result is a distortion. Thomas says that evil has a cause only accidentally because intention is not part of the essence of evil. Nobody *intends* to do evil -- even a wicked person acts for what he perceives to be a good. Because evil is a lack of something, someone cannot really intend to accomplish evil, for intention and action are by nature movement toward something. Evil is simply the disordered use of what is good. Thus, Thomas says that the goodness of something depends upon “what it is in itself, and on its order to the whole universe, wherein every part has its own perfectly ordered place.”(I.q.49.a.3.c.)

Now that he has explained the nature of good in general, Thomas discusses the nature of the good for man. The good for man will consist in the perfection of his form

and function; this requires first of all the good use of what is proper to man's nature. So

Thomas looks to the will, which is the power by which we make use of what we have:

It follows that the absolute good of man consists in good operation, or the good use of something possessed. Now we use all things by the act of the will. Hence from a good will, which makes a man use well what he has, man is called good, and from a bad will he is called bad . . . Therefore, because the fault itself consists in the disordered act of the will, and the pain consists in the privation of something used by the will, fault has more of evil in it than pain has. (*I.q.48.a.6.c.*)

The ancients revere the intellect for its ability to grasp universal truth; the moderns prefer the will and its pursuit of particular desires. Thomas steers a middle ground. He maintains that the intellect is, in general, higher than the will insofar as its object is "more simple and more absolute than the object of the will," for "the more simple and the more abstract a thing is, the nobler and higher it is in itself." But he also allows that the will can be higher than the intellect if its object "occurs in something higher than that in which occurs the object of the intellect." Therefore, "the love of God is better than the knowledge of God; but on the contrary, the knowledge of corporeal things is better than the love thereof." (*I.q.82.a.3.c.*)

Thomas explains that it is primarily free will that sets man apart from the animals, since it encompasses both his rational and appetitive nature:

The proper act of free will is choice: for we say that we have a free will because we can take one thing while refusing another: and this is to choose. Therefore we must consider the nature of free will by considering the nature of choice. Now two things occur in choice . . . on the part of the cognitive power, counsel is required, by which we judge one thing to be preferred over another: and on the part of the appetitive power, it is required that the appetite should accept the judgment of counsel . . . since good, as such, is the object of the appetite, it follows



that choice is principally an act of the appetitive power. And thus free-will is an appetitive power. (I.q.83.a.3.c.)

Hence Gregory of Nyssa says that choice is neither desire only, nor counsel only, but a combination of the two. For just as we say that an animal is composed of soul and body, and that it is neither a mere body nor a mere soul, but both, so it is with choice. . . an act whereby the will tends to something proposed to it as being good, through being ordained to the end by the reason, is materially an act of the will, but formally an act of the reason. Now in such like matters the substance of the act is as the matter in comparison to the order imposed by the higher power. Wherefore choice is substantially not an act of the reason but of the will: for choice is accomplished in a certain movement of the soul towards the good which is chosen. Consequently it is evidently an act of the appetitive power. (I-II.q.13.a.1.c.)

The appetite, which moves man to his end, is a good insofar as it is a power.

The task of reason is not to beat the appetite into submission but to train it to desire the right things. Thomas places himself squarely between the ancients and the moderns by showing that ultimately, a proper will is all that is necessary for a fully human life (that is, one that attains its end). Although the intellect is the “highest” aspect of man, the fulfillment of our natures can be reached in ways apart from philosophy. Free will, like the autonomy that moderns cherish, is concerned with choice. But in sharp contrast to the moderns, Thomas insists that choice is properly exercised not when it is valued for its own sake, but only when it is directed toward that which lies outside the soul. People may have different ways of pursuing the good, based on their particular talents and situations, but all actions should tend to the *bonum universale*, or ultimate good, of man.

The human condition may be partly described as an appetite or a longing, but it is a longing that must be informed by reason. The ability to choose is an essential

feature of human being -- but choice is a truly *human* act only if it is employed, not for its own sake, but for the achievement of man's proper end, which is happiness. As Thomas notes, "Man by nature craves happiness and bliss." So essential is happiness to human nature, that man cannot choose not to want it. Now, to say that "man by nature seeks happiness" is to imply that "by nature he does not already possess it . . . Man is not happy by virtue of his being. Rather, his whole existence is determined precisely by the nonpossession of ultimate gratification."<sup>45</sup> But there cannot be several ultimate happinesses, based on the variety of personal choices. Happiness, as man's final end, has the nature of something singular:

It is therefore necessary for the last end so to fill man's appetite, that nothing is left besides it for man to desire. Which is not possible, if something else be required for his perfection. Consequently it is not possible for the appetite so to tend to two things, as though each were its perfect good. (I-II.q.1.a.5.c.)

If happiness is something singular, it cannot reside in that which exists for the sake of something else. So, for example, happiness cannot reside in wealth, since wealth "serves man as a remedy for his natural wants" and is therefore "sought for the sake of something else, as a support of human nature." Happiness, which by nature endures forever, cannot reside in fame and glory, which, being based on human opinion, often fail.(I-II.q.2.a.3.c.) Happiness cannot reside in power, since "power has the nature of a principle . . . whereas happiness has the nature of a last end." Furthermore, power can tend to good or evil, but happiness is man's "proper and perfect good." (I-II.q.2.a.4.c.) Finally, happiness, which is proper to man, cannot reside merely in bodily

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45. Pieper, Josef, *Happiness and Contemplation*, trans. Richard and Clara Winston, (South Bend, Indiana: St. Augustine's Press, 1998), 27.

goods, since in attributes like strength and size, man is “surpassed by many animals.” Out of all the various human goods -- wealth, power, honor, glory, only happiness can satisfy in and of itself. “Having gained happiness, man cannot lack any needful good.” (I-II.q.2.a.4.c.) Since “that which constitutes happiness is something outside the soul,” happiness may be thought of as the quenching of a thirst. (I-II.q.2.a.7.c.) The thirster seeks something outside of himself. Existence alone cannot be happiness, for “the allaying of the thirst cannot consist simply in the mere continued existence of the thirster.”<sup>46</sup> Man desires the *bonum universale* – the “whole good –goodness so very good there is nothing in it which is not good, and nothing outside of it which could be good. Nothing less than this *bonum universale* can quench completely and ultimately man’s deepest thirst.”<sup>47</sup>

Thus, Thomas notes that “happiness is man’s supreme perfection. Now, each thing is perfect in so far as it is actual; since potentiality without act is imperfect. Consequently, happiness must consist in man’s last act.” (I-II.q.3.a.2.c.) When something is complete, its potential has been fulfilled. As Josef Pieper says:

*Realization is achieved by action . . . that is to say, only by acting does man achieve the fullness of his reality. . . Happiness, then, as drinking of the drink, must be thought of as a form of acting which opens all the potentialities of man to fullest realization.*<sup>48</sup>

If the essential quality of happiness is realization, or a completedness, then the activity in man which most resembles happiness is that which is the most self-sufficient.

This is contemplation. Thomas says:

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46. Ibid., 36.  
47. Ibid., 40.  
48. Ibid., 53-54.

In men, according to their present state of life, the final perfection is in respect of an operation whereby man is united to God . . . by one, continual, everlasting operation. But in the present life, in as far as we fall short of the unity and continuity of that operation, so do we fall short of perfect happiness. Nevertheless it is a participation of happiness: and so much the greater, as the operation can be more continuous and more one. Consequently the active life, which is busy with many things, has less of happiness than the contemplative life, which is busied with one thing, i.e., the contemplation of truth. (I-II.q.3.a.2.c.)

Contemplation, which is “sought principally for its own sake,” and is therefore an end, is chiefly an operation of the speculative intellect, which grasps first principles and is therefore higher than the practical intellect, which directs man’s particular actions and passions. Furthermore, “in the contemplative life man has something in common with things above him, viz., with God and the angels, to whom he is made like by happiness,” whereas in matters concerning the active life, man possesses some things in common with the animals.(I-II.q.3.a.5.c.) Contemplation may be thought of as encompassing the very essence of being, understood as the beginning and fulfillment of all things:

Final and perfect happiness can consist in nothing else than the vision of the Divine Essence . . . First . . . man is not perfectly happy, so long as something remains for him to desire and seek: secondly . . . the perfection of any power is determined by the nature of its object. Now the object of the intellect is *what a thing is, i.e.*, the essence of a thing . . . when man knows an effect, and knows that it has a cause, there naturally remains in man the desire to know about that cause, *what it is*. And this desire is one of wonder, and causes inquiry . . .Consequently, for perfect happiness the intellect needs to reach the very Essence of the First Cause. And thus it will have its perfection through union with God as with that object, in which alone man’s happiness consists.(I-II.q.2.a.8.c.)

Contemplation means that “the whole energy of our being is ultimately directed toward attainment of insight.”<sup>49</sup> It is the instant in which we make sense of our existence. This resonates with Levi’s description of the flash of insight gained when discussing Dante with a fellow prisoner. The ancients too saw contemplation as man’s highest end, but they believed it to be the sole province of the philosophers. But for Thomas contemplation does not necessarily mean philosophizing, although philosophy can be a fine means to the end of contemplation. Contemplation “is a form of knowing arrived at not by thinking but by seeing, intuition.”<sup>50</sup> Pieper explains:

Intuition is without a doubt the perfect form of knowing. For intuition is knowledge of what is actually present, the parallel to seeing with the senses is exact. Thinking, on the other hand, is knowledge of what is absent . . . the subject matter of thinking is investigated by way of something else which is directly present to the mind, but the subject matter is not seen as it is in itself. The validity of thinking, Thomas says, rests upon what we perceive by direct intuition; but the necessity for thinking is due to a failure of intuition . . . Contemplation, then, is intuition; that is to say, it is a type of knowing which does not merely move toward its object, but already rests in it.<sup>51</sup>

Contemplation is a kind of seeing; again it is the instant in which we make sense of the universe, the world, and our very existence. Pieper notes:

For Thomas as well as for Augustine, cognition is essentially seizure of the world and grasping of reality. To know is by the nature of knowing to have; there is no form of having in which the object is more intensely grasped . . . knowing is the highest mode of having because in the world there is no other form so thoroughgoing. Knowing is not only appropriation . . . (but) is assimilation in the quite exact sense that the objective world, in so far as it is known, is incorporated into the very being of the knower . . . No other material thing can be present in the space occupied by a house, a tree or a fountain pen. But where there is

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49. Ibid., 58.

50. Ibid., 74.

51. Ibid., 74.

mind, the totality of things has room; it is ‘possible that in a single being the comprehensiveness of the whole universe may dwell.’ . . . Happiness is attained in an act of cognition because there is no other perfect way in which we can truly obtain ‘the whole good,’ and all reality in general.<sup>52</sup>

Levi said that the conviction that life has a purpose is rooted in the very fiber of our being. Even the autonomy theories of human rights cherish the idea that life has meaning, although they believe that it is a meaning chiefly imputed by man.

Contemplation is chiefly the faculty by which we can understand the purpose of life.

Pieper notes that “Contemplation directs its gaze straight at the heart of objects. In so doing, it perceives in the depths a hitherto hidden, nonfinite relationship.”<sup>53</sup> He

explains, that “the gaze of earthly contemplation respects the visible aspects of objects in this world, and tries to preserve them . . . Veneration for concrete reality is kindled by the contemplative impulse which seeks the divine meaning underlying all beings.”<sup>54</sup>

In this sense, contemplation encompasses poetry, philosophy, religion and science – it is about perceiving a greater reality behind ordinary objects. “Everything holds and conceals at bottom a mark of its divine origin,” and “one who catches a glimpse of it ‘sees’ that this and all things are ‘good’ beyond all comprehension,” and “seeing this, he is happy.”<sup>55</sup>

So far, we have established that the good of anything is the fullness of its being.

The ultimate good for man is happiness. Although there may be a number of ways to attain happiness, the nature of happiness as a final end is the same for all – it is the

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52. Ibid., 66.

53. Ibid., 86-87.

54. Ibid., 87-88.

55. Ibid., 88.

union of the individual with a greater reality. The activity which most closely approximates man's final end is contemplation, through which man gains insights into the purposeness of life and the world. But contemplation is not an automatic process; it is rather like an art that must be cultivated. So how do we live so as to open ourselves to the possibility of contemplation?

The first step to achieving happiness is the right disposition of the will – we must want the right things. (I-II.q.a.4.c.) Like Aristotle, Thomas understands that because man is a composite of body and soul, his ultimate happiness will not be achieved in defiance of the body, but will rather be facilitated by it. Our actions are as intrinsic as the disposition of our mind to achieving happiness. Good actions are also necessary because man cannot possess happiness without some movement on his part, since “happiness naturally belongs to God alone. Therefore it belongs to God alone not to be moved towards Happiness by any previous operation . . . man obtains it by many movements of works, which are called merits . . . happiness is the reward of works of virtue.”(I-II.q.5.a.7.c.) Man approaches happiness by performing the actions that are most suited to his nature:

For since every agent or thing moved acts or is moved for an end . . . those are perfectly moved by an intrinsic principle, whose intrinsic principle is one not only of movement but of movement for an end. Now in order for a thing to be done for an end, some knowledge of the end is necessary. Therefore, whatever so acts or is moved by an intrinsic principle, that it has some knowledge of the end, has within in itself the principle of its act, so that it not only acts, but acts for an end . . . the movements of such things are said to be voluntary.(I-II.q.6.a.1.c.)

To act voluntarily, then, is to move oneself toward an end with full knowledge of what one is doing and why. A voluntary act is one taken according to one's own free will -- it is an action that can be *justified*. Thomas explains that human acts "consider first the general principles, and secondly, matters of detail." (I-II.q.6) Human nature dictates that we know first principles and act according to them. This means that the will is not an end in itself, but exists for the purpose of moving us toward happiness. Although the contemplative life is higher than the active life, we cannot achieve it apart from the right actions. Thus, we require good habits.

Thomas notes that habit is "a disposition in relation to a thing's nature, and to its operation or end, by reason of which disposition a thing is well or ill disposed thereto." (I-II.q.49.a.4.c.) If habits dispose a being to drawing "close to the ideal type toward which it is tending, they are good habits. If, on the contrary, they draw it away from this ideal, they are bad habits."<sup>56</sup> Because habit concerns beings whose nature consists of "potentiality and act," it does not apply to the idea of God, "whose substance is its own operation, which is itself for itself." Nor does habit apply so simply anything in a "state of potentiality in regard to something else," but only to that which is "capable of determination in several ways and to various things." (I-II.q.49.a.4.c.) So habit would not apply to the ordinary operations of nature, like growth.

So we might say that habits apply uniquely to man, but only if man has a natural end. If man's operation is an end to itself, like Rousseau's "sweet sentiment of existence," then he would be on par with God. Man needs habits only insofar as there is

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56. Gilson, Etienne, *The Christian Philosophy of St. Thomas Aquinas*, (Notre Dame, Indiana: University of Notre Dame Press, 1956), 256.



something to be achieved outside of his immediate self interest. Habits confirm man's unique status as a being who is free to accept or reject the dictates of his nature.<sup>57</sup>

Thomas explains that good habits culminate in virtue, and affirms that "*Virtue is a good quality of the mind, by which we live righteously, of which no one can make bad use.*"

Virtue implies a perfection of power: wherefore the virtue of a thing is fixed by the limit of its power . . . Now the limit of any power must needs be good; for all evil implies defect . . . And for this reason the virtue of a thing must be regarded in reference to good. Therefore human virtue which is an operative habit, is a good habit, productive of good works. (I-II.q.55.a.4.c.)

Now a habit may be directed to a good act in two ways. First, in so far as by the habit a man acquires an aptness to a good act . . . Secondly, a habit may confer not only aptness to act, but also the right use of that aptness: for instance, justice not only gives man the prompt will to do just actions, but also makes him act justly . . . virtue is that *which makes its possessor good, and his work good likewise* . . . The subject of a habit which is called a virtue simply, can only be the will, or some power in so far as it is moved by the will. And the reason of this, that the will moves to their acts all those powers that are in some way rational.(I-II.q.56.a.4.c.)

Virtue is the result of a well-directed will. Because man is a composite of body and soul, human acts require both intellectual and moral virtue.<sup>58</sup> Following Aristotle, Thomas identifies the purely intellectual virtues as wisdom, science and understanding. Now, truth can be either self evident (such as the proposition that *the same thing cannot be affirmed and denied at the same time*) and known in itself, or known through

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57. See Gilson, p. 258: "Habits are but so many self-provided instruments among which the intellect may always freely choose and over which it is finally the master. But it has only provided itself with them because it has had to acquire them in order to satisfy the conditions demanded by the proper nature of its operation."

58. See Gilson, p. 261: "For man to act well, not only must his reason be well disposed by the habit of intellectual virtue, but his appetite to, or his faculty of desiring, must be well disposed by the habit of moral virtue."

deduction or by way of something else. Understanding concerns the grasping of first principles.(I-II.q.57.a.2.c.)<sup>59</sup> Truths that are deduced rather than self evident “no longer depend upon the intellect, but on reason.”<sup>60</sup> Reason can tend “toward conclusions which are last in a given genus,” which is science, or it “can also tend toward conclusions which are absolutely last – the highest conclusions of all,” which is wisdom. Etienne Gilson notes:

Since science is a virtue which puts reason into a state in which it can judge certain objects of knowledge soundly, there can be and must be many sciences in a human mind. But since wisdom, on the contrary, bears on last causes and on the object which is both the most perfect and most universal, there can be but one object of knowledge in this order, and consequently but one wisdom . . . Science or knowledge, the habit of conclusions deduced from principles, depends upon understanding, which is the habit of principles. Both science and understanding depend upon wisdom, which contains and rules them, because it judges not only understanding and its principles, but also science and its conclusions.<sup>61</sup>

But it is not enough for man, using the intellectual virtues, to know what is right. He must *do* what is right. Like Aristotle, Thomas explains that prudence, or “right reason about things to be done,” acts as a kind of gateway between the intellectual and moral virtues:

Prudence is a virtue most necessary for human life. For a good life consists in good deeds. Now in order to do good deeds, it matters not only what a man does, but also how he does it; to wit, that he do it from right choice and not merely from impulse or passion. And, since choice is about things in reference to the end, rectitude of choice requires two

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59. See also Gilson, 262: “The immediate knowledge of principles at the very moment of sense experience is the first habit of the intellect and its first virtue. It is the first permanent disposition which the intellect contracts and the first perfection with which it is enriched. Accordingly, the name understanding or intelligence is given to this virtue which helps the intellect with its knowledge of immediately evident truths or principles.”

60. Ibid., 262.

61. Ibid., 262.

things; namely, the due end, and something suitably ordained to that end. Now a man is suitably directed to his due end by a virtue which perfects the soul in the appetitive part, the object of which is the good and the need. And to that which is suitably ordained to the due end man needs to be rightly disposed by a habit in his reason, because counsel and choice, which are about things ordained to the end, are acts of the reason. Consequently an intellectual virtue is needed in the reason, to effect the reason, and make it suitably affected towards things ordained to the need; and this virtue is prudence.(I-II.q.57.a.5.c.)

Prudence may reveal the right course of action one should take, but this does not mean that sound reason is all that is required for man to act well, or that every bad action is due to ignorance. This is because “the appetitive faculty obeys the reason not blindly, but with a certain power of opposition.” Therefore, says Thomas, “for a man to do a good deed, it is requisite not only that his reason be well disposed by means of a habit of intellectual virtue; but also that his appetite be well disposed by means of a habit of moral virtue.” (I-II.q.58.a.2.c)

Thus, Thomas maintains the middle ground between those who suppose that human beings are either exclusively animals who speak (and ruled by passions) or gods who sleep (and concerned only with intellectual virtue). He shows that there is a necessary partnership between the intellectual and moral virtues because man cannot escape the reality of both his body and his soul.<sup>62</sup> It is not enough that man is able to choose his own course of action; to remain integrated and whole, he must choose well. This is impossible without reliance on the intellectual virtues, and especially on those first principles which are grasped by understanding. But likewise, knowledge of first

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62. Although Aristotle also stipulated the necessary partnership between the intellectual and moral virtue, Thomas differs from the ancients in his assumption that achieving the highest human life does not necessarily require that one be a philosopher.

principles is pointless unless one is willing to carry them out in particular circumstances. Through understanding, man may be rightly disposed to universal principles of action; but this does not guarantee proper reasoning in particular cases, where passion may interfere with thinking. Only through moral virtue does man acquire the habits by which he can properly regulate the passions, and therefore be capable of performing the actions that are truly human. Universal principles of right are thus meaningless without the individual moral virtue to apply them. Therefore, moral virtue applies to the totality of man; reason and appetite.

The four principle moral virtues are prudence, which we have just discussed, justice, temperance and fortitude. Acts are good, and virtuous, insofar as they are ruled by reason. Prudence is reason itself. Justice is the reasonable regulation of external acts in general by assigning “to each his due, neither more nor less.”<sup>63</sup> The virtue of fortitude prevents the passions from “withdrawing us from following the dictate of reason, e.g., through fear of danger or toil: and then man needs to be strengthened for that which reason dictates, lest he turn back.”(I-II.q.61.a.2.c.) The virtue of temperance curbs the passions from “inciting to something against reason.” Of the moral virtues, Thomas explains, justice is the highest, “as being most akin to reason:”

This is evident by considering its subject and its object: its subject, because this is the will, and the will is the rational appetite . . . its object or matter, because it is about operations, whereby man is set in order not only in himself, but also in regard to another . . . Among the other moral virtues, which are about the passions, the more excellent the matter in which the appetitive movement is subjected to reason, so much the more does the rational good shine forth in each. Now in things touching man, the chief of all is life, on which all other things depend. Consequently

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63. Gilson, 264.

fortitude which subjects the appetitive movement to reason in matters of life and death, holds the first place among those moral virtues that are about the passions . . . after fortitude comes temperance, which subjects the appetite to reason in matters directly relating to life, in the one individual or in the one species, viz., in matters of food and sex. (I-II.q.66.a.4.c.)

The more universal a subject is, the more excellent it is considered to be. Note that although life is of chief importance, and that on which “all other things depend,” justice is deemed more excellent, since it considers not just the life of one man, but ordering the right operations between two or more people. This helps us to understand that life, while being the most fundamental value, may sometimes be taken with justification in order to preserve other lives, such as in warfare or self-defense. But again, all the moral virtues are ultimately subsumed under wisdom, the highest of the intellectual virtues since it “considers the Supreme Cause, which is God.” (I-II.q.66.a.5.c.) Prudence, which directs the highest aspect of human affairs, could not be greater than wisdom “*unless, as stated in Ethic. Vi.7, man were the greatest thing in the world.*” And if man were the highest thing in the world, as we have seen, there would be no reasonable way to speak about virtue, dignity, or universal rights. “For prudence has no business with supreme matters which are the object of wisdom: but its command covers things directed to wisdom, viz., how men are to obtain wisdom. Wherefore prudence, or political science, is, in this way, the servant of wisdom; for it leads to wisdom, preparing the way for her, as the doorkeeper for the king.”(I-II.q.66.a.5.r.1)

Furthermore, Thomas explains, when considered on the part of the subject, virtue “may then be greater or less either in relation to different times, or in different men.” Taking into account the wide range of human personalities and abilities, Thomas affirms that people will not achieve virtue equally, and that “the nature of virtue does not require that man should reach the mean of right reason as though it were an indivisible point, as the Stoics thought; but it is enough that he should approach the mean.” (I-II.q.66.a.1.c.) Different people, therefore, will have different capacities for virtue.

We began our discussion of Thomas with his maxim that good is to be done; evil is to be avoided. This seemingly simple phrase contains many layers of embedded meaning. Everything in existence has goodness to some degree. Perfect goodness is the fullness of being. A thing becomes more completely good as it approaches the fullness of being. The good of man is happiness. Happiness may be achieved in a variety of ways, but nevertheless constitutes the single end of a common human nature encompassing a wide variety of individuals. Happiness is knowing truth; knowing truth is called contemplation. When man is engaged in contemplation, he may be thought of as discerning the meaning of life; discovering the order in nature and the essential interconnectedness of all creation, or coming to the realization that all things and actions are meaningful. In short, through contemplation, man realizes that life has a purpose. Man opens himself to the possibility of contemplation by living a life that is most properly human – that is, one directed by free will. In order to voluntarily tend toward the good, man must be strengthened by good habits, which lead to virtue – the

quality of the mind by which one lives rightly. And although the highest aspiration of man is union with something that is outside of himself – the divine – this does not mean that the body has less relevance than the soul. Indeed, it is only through the proper use of the appetitive nature – that is, through actions directed by moral virtue - that man is free to pursue the intellectual virtues at all.

The idea of human rights takes its bearings from the notion that all people possess an intrinsic moral worth. The autonomy view, in denying a common human nature, cannot logically support the idea of universality. For Thomas, however, there is one final end of all human beings – the happiness which resides in the contemplation of truth. Given this, what should the function of universal human rights be? Indeed, can the idea of universal rights find a place in Thomistic philosophy at all? To answer these questions, let us return again to Thomas’s discussion of natural law.

### **Natural Law and Community: Human Good and the Common Good**

Recall Thomas’s definition of law: “Law is an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”(I-II.q.90.a.4.c.) Since it exists to direct human actions, the main element of law is reason, for it is through reason that man reaches his natural end, happiness:

Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness . . . the law is chiefly ordained to the common good (thus) any other precept in regard to some individual work, must needs be devoid of the nature of law, save in so far as it regards the common good.(I-II.q.90.a.2.c.)

For Thomas, the common good and the individual good are inextricably tied. The common good is the condition wherein the citizens of a political community are able to pursue their ends as individuals. The end of each individual is happiness; the law protects the common good by protecting the ability of individuals to pursue happiness. If the most important function of the law is to provide for the common good, a regime does not necessarily have to be democratic to be valid. The type of government is less important than the end for which government exists.<sup>64</sup>

We should bear in mind that the notion of the common good can encompass all the individuals within a political community only if all people really do have a common end. If the final good of human being is not the same for everyone, then there can be no *common* good, but only the greatest good for the greatest number, or the good as defined by the most powerful element of society. Thus, to speak coherently of a common good we must begin from principles which are unchanging and applicable to all; this is only possible from the standpoint of the assumption that the universe is ordered.

Recall our discussion in Chapter 3, where we noted that for Thomas, all law has its source in the eternal law, or Divine Providence, which governs the “whole community of the universe” by “Divine Reason.” (I-II.q.91.a.1.c.) Now, “all things partake somewhat of the eternal law, in so far as, namely from its being imprinted on

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64. Thus, John Paul II notes that while democracy is admirable, it and of itself it is not intrinsically connected to the human good: “Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality. Fundamentally, democracy is a ‘system’ and as such is a means and not an end. Its ‘moral’ value is not automatic, but depends on conformity to the moral law to which it, like every other form of human behavior, must be subject: in other words, its morality depends on the morality of the ends which it pursues and the means which it employs.” (*Evangelium Vitae*, 127-28.



them, they derive their respective inclinations to their proper acts and ends.” Natural law is the “participation of the eternal law in the rational creature . . . The light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light.”(I-II.q.91.a.2.c.) The eternal law is the source of the natural law, from which human laws, insofar as they are guided by right reason, are derived.<sup>65</sup>

Again, the type of government is less important than the fact that the law function for the common good. For Thomas, a common good can be discerned because human reason is capable of uncovering certain universal truths. A law that provides for the common good not only help people to be good *citizens*; it helps them to be good *simply*:

The proper effect of law is to lead its subjects to their proper virtue; and since virtue is *that which makes its subject good*, it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect. For if the intention of the lawgiver is fixed on true good, which is the common good regulated according to Divine justice, it follows that the effect of the law is to make men good simply. If, however, the intention of the lawgiver is fixed on that which is not simply good, but useful or pleasurable to himself, or in opposition to Divine justice, then the law does not make men good simply, but in respect to that particular government. (I-II.q.92.a.1.c.)

Since then every man is part of the state, it is impossible that a man be good, unless he be well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it.

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65. Thomas notes: “Just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, so from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed.” (I-II.q.91.a.3.c.) Thus, Thomas argues, “All laws, insofar as they partake of right reason, are derived from the eternal law.” (I-II.q.93.a.3.c.)

Consequently the common good of the state cannot flourish, unless the citizens be virtuous, at least those whose business it is to govern. But it is enough for the good of the community, that the other citizens be so far virtuous that they obey the commands of their rulers. (I-II.q.92.a.1.r.3)

The more closely a law resembles the natural law, that is, the more general and consistent it is with the logic of natural law, the more it will aim to make people good simply, and not just good with respect to a particular country. A law that seeks the common good is also less conducive to tyranny, for tyranny is the condition in which a ruler or ruling party makes their own self interest the common good.<sup>66</sup>

So far, we have seen in Thomas that a universal law, such as one pertaining to international human rights, must be, first and foremost, a true law – that is, it must contain the proper elements of law. It must be reasonable, and directed to the common good. The common good contains in it the idea of human dignity. The natural law for each individual dictates that good is to be done and evil avoided. This means that each person should act in a way that best fulfills the end of human being – by living virtuously, or according to reason. The common good is a universal good. Any law which justifies something that is not truly good for all people, then, is not law in the proper sense. To be just, the burdens of law must be “laid on the subjects, according to an equality of proportion and with a view to the common good.” (I-II.q.96.a.4.c.) To be good, a law or action must be reasonable, for reason is what leads us to the fullness of being. It follows from this that any law which takes us away from the direction of

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66. See Gilson, p. 328: “Tyranny is not necessarily confined to one man. It can happen among a people that a tiny group of men succeed in dominating all the rest and in exploiting them for their own ends. The fact that such a group is careful to identify the common good of the people with its own private ends does not alter the situation.”

reason is not law in the proper sense. Now, the general common good of any society is one in which individuals are free to pursue their ends as human beings. But on the level of particular societies, laws will vary insofar as different circumstances call for different applications of the natural law. Thomas says:

Since the speculative reason is busied chiefly with necessary things, which cannot be otherwise than they are, its proper conclusions, like the universal principles, contain the truth without fail. The practical reason, on the other hand, is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. (I-II.q.94.a.4.c.)

A truly universal law -- one applicable to all people in all circumstances -- would concern only principles of speculative reason, which would yield universal conclusions. But as we descend from the level of understanding universal principles to the application of those principles in specific situations, the natural law will prescribe different things. Thus Thomas explains that the law of nations concerns “those things which are derived from the law of nature, as conclusions from premises, *e.g.*, just buyings and sellings, and the like, without which men cannot live together . . . But those things which are derived from the law of nature by way of particular determination, belong to the civil law, according as each state decides on what is best for itself.”(I-II.q.95.a.4.c.)

This also explains why most people seem able to agree on general principles, but disagree on the application of those principles – many things can interfere with the proper reasoning of principles to their conclusions: “since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature.” And in some cases,

it is simply that “the greater the number of conditions added” to the principle, “the greater the number of ways in which the principle may fail.” (I-II.q.94.a.4.c.) The principles of natural law, then, are true for all, but the application of those principles are less universal as they concern more particular actions. The natural law, in the abstract, “can nowise be blotted out from men’s hearts. But it is blotted out in the case of a particular action, in so far as reason is hindered from applying the general principles to a particular point of practice, on account of concupiscence or some other passion.”(I-II.q.94.a.6.c.)<sup>67</sup> If we keep the law to the level of first principles, then it would necessarily focus more on prohibiting, rather than prescribing, actions, for the former can be universally applied, while the latter will vary according to individual situations and resources. On the most fundamental level, “rights” is a superfluous term; for the only “rights” prescribed by natural law are those which correspond precisely to duties.

Natural law is concerned with things that are necessary to man as man. The precepts of natural law are self evident; so for example, the proposition “*Man is a rational being*, is, in its very nature, self-evident, since who says *man* says *a rational being*.” Thomas explains:

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67. See also Gilson, p. 267-68: “Between the universal principles of natural law and the infinitely complex detail of the particular acts which should be in conformity with it, an abyss opens up which no individual reflection can cross by itself and which it is the particular mission of human law to close.” Gilson adds that “human law has no principle of its own to invoke. It is strictly limited to defining ways of applying natural law. When the princes or States legislate, they only deduce from the universal principles of natural law the particular consequences necessary for life in society . . . If on the other hand, the State or the prince establishes laws solely to satisfy their own cupidity or their thirst for glory, or if they promulgate such laws without the authority to do so, or if they distribute the burdens of the State among the citizens unfairly, or if the burdens they try to impose are excessive and disproportionate to the good which is sought, then they are unjust laws and no one is bound in conscience to obey them. There can, of course, be a temporary obligation to observe them in order to avoid scandal and disorder, but sooner or later they must be modified.”

Now a certain order is to be found in those things that are apprehended universally. For that which, before aught else, falls under apprehension, is *being*, the notion of which is included in all things whatsoever a man apprehends. Wherefore the first indemonstrable principle is that *the same thing cannot be affirmed and denied at the same time*, which is based on the notion of *being* and *not-being*: and on this principle all others are based . . . Now as *being* is the first thing that falls under the apprehension simply, so *good* is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good . . . Hence this is the first precept of the natural law, that *good is to be done and pursued, and evil is to be avoided*. All other precepts of the natural law are based upon this.(I-IIq.94.a.2.c.)

To be coherent, any law that is based on natural law -- as Thomas would say, any law in the true sense of the word -- cannot stand in opposition to its premises. Thus, if law, which is an ordinance of reason, is to direct human beings to their end, it must respect, first of all, *being*, or life, which must exist before any reasoning can occur at all. After that, the law must promote the qualities proper to man's human nature:

In man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to the nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law *which nature has taught to all animals*, such as sexual intercourse, education of offsprings, and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society.(I-IIq.94.a.2.c.)

As Etienne Gilson notes, "Man is, to begin with, a being like all others. More particularly, he is a living being, like all other animals. Finally, by the privilege of his nature, he is a rational being. Thus it is that three great natural laws bind him, each in

its own way.”<sup>68</sup> Being, or life, is the foundation of all things that are necessary to man. “Good” is anything that contributes to the fullness of being; “evil” is anything that diminishes being. Based on this, we must conclude that, apart from an act necessary to defend one’s own life, there cannot be a universal “right” to any action that intentionally causes the death of another, or oneself.

Those who view autonomy as the highest element of man and the mark of human dignity might believe that suicide is consistent with a life lived according to one’s own choosing. But Thomas’s three-part order of inclinations clearly precludes suicide or euthanasia as an affront to being, the very foundation of man’s ability to be autonomous in the first place. Because life is the basis of all human goods, it can be taken only when life itself is at stake, as in self-defense or just war. It should be noted that capital punishment would be permissible only if there was no other way to defend society from the criminal. This is hardly the case in today’s society.<sup>69</sup>

Human laws should reflect, or at least not contradict, the order of inclinations found in natural law. Thus, law must promote man’s beginning (or *being*), by preserving life, and his end, or his purpose, by protecting his ability to live virtuously. For although “man has a natural aptitude for virtue,” the “perfection of virtue must be

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68. Ibid., 266-67.

69. John Paul II notes that “The primary purpose of the punishment which society inflicts is ‘to redress the disorder caused by the offense.’ Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment of the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfils the purpose of defending public order and ensuring people’s safety, while at the same time offering the offender an incentive and help to change his or her behavior and be rehabilitated. It is clear that, for these purposes to be achieved, *the nature and extent of the punishment* must be carefully evaluated and decided upon, and ought not to go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.” (*Evangelium Vitae*, 99-100).

acquired by means of some kind of training.” Man cannot achieve this training on his own, “since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all man is inclined. Therefore, a man needs to receive this training from another, whereby to arrive at the perfection of virtue.” For some, parental instruction will suffice; but for those “not easily amenable to words,” it is necessary “for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous.” Thomas explains that “this kind of training, which compels through fear of punishment, is the discipline of laws.”(I-II.q.95.a.1.c.)

And so with Thomas we see that laws are meant to promote the well being of the citizens, but no less are they to promote what is the true well-being of the criminal. Rather than existing for the purpose of erecting barriers so that we may leave each other alone, the law, by promoting virtue facilitates the relationships that lead to true community. It is important to realize that this does not mean that the law should be expected to literally prescribe virtuous acts. It means, rather, that it would be wrong for the law to do anything that would positively impede man’s capacity for moral virtue, as did Nazi Germany in the concentration camps. Thomas, agreeing with Isidore, says, “law should be *possible both according to nature, and according to the customs of the country:*”

Many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man . . . Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous

abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained; thus human law prohibits murder, theft and such-like. (I-II.q.96.a.2.c.)

Law, especially universal law, must be a floor which men cannot sink below rather than a ceiling to which they must rise up. And the floor, it would seem, must consist of protecting those things necessary to man – the three-tiered order of inclinations of natural law. So any universal law must prohibit, first and foremost, all offenses to being – that is life. It would seem necessary that it offer some protection for the family, which is both the cradle of “being” (by ensuring the preservation of the species); and the seedbed of virtue (through its role as the primary teacher of the young). The family is thus the embodiment of the fullness of human life. But rather than prescribing specific measures for the development of the good habits that lead to virtue, a universal law must instead prohibit practices such as those governing the concentration camps and other forms of torture, that intentionally aim at rendering one incapable of free will.

A human rights regime based on natural law would focus primarily on life – from its basis, or foundation; to its end, or purpose. Because life is the *sine qua non* of every other good to which reason can aspire, its preservation is the most crucial task of the law. That the first concern of law must be the preservation of life may seem obvious to the point of simplicity, but to uphold life as an absolute good would actually effect a radical shift in the direction that U.S. and international law has taken in the past thirty years, particularly with regard to abortion.



Although no human rights treaties specifically recognize abortion as a human right, many abortion rights NGO's, such as the International Women's Health Coalition (IWHC), the Center for Health and Gender Equity, the Feminist Majority, Ipas (the manufacturer of the portable abortion machine) and International Planned Parenthood Federation, to name just a few, lobby very hard at the U.N. for the outward recognition of abortion as a fundamental human right, and barring that, broad judicial interpretation of human rights treaties that will find an "implied" right to abortion among specific treaty provisions. Indeed, where abortion does not exist as a "hard" norm specifically granted by human rights documents, it is generally understood at the U.N. to be included under the rubric of "sexual and reproductive health" asserted in various documents.<sup>70</sup>

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70. This attitude was perfectly demonstrated at a June 2001 prepcom for a UN Special Session on Children. Andras Vamos-Goldman, who heads Canada's permanent mission to the U.N., was asked by U.S. Delegate Terry Miller to define the word "services" as it was to be used in a document calling for "full gender equality and equal access to services." Vamos-Goldman replied, "The distinguished delegate of the United States knows that, *of course* -- and I hate to use the word - but in 'services' is included abortion." (emphasis added) See Mary Jo Anderson, "The U.N.'s War Against Children," *19 Crisis: Politics, Culture and the Church* (September, 2001), p. 28. The Center for Reproductive Rights advocates the development of "soft norms," including "jurisprudence" or judicial interpretation, "interpretations of human rights treaty committees, rulings of international tribunals, resolutions of inter-governmental political bodies, agreed conclusions in international conferences and reports of special rapporteurs. (CR,2)to interpret the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and even the Convention on the Rights of the Child (CRC), as granting a fundamental human right to abortion. (See U.S. Congress. House of Representatives. Representative Christopher H. Smith. "Documents Reveal Deceptive Practices by Abortion Lobby." *Congressional Record -- Extension of Remarks*, E2535-E2536 (8 December, 2003) Even the UN Children's Fund (UNICEF) has transmogrified in recent years from an organization existing primarily to feed starving children, to one that has become increasingly focused on promoting abortion. See Sylva, Douglas A., Ph.D., *The United Nations Children's Fund (UNICEF): Women or Children First* White Paper Series Number Three (Catholic Family and Human Rights Institute International Organizations Research Group: 2003).

The conviction that abortion ought to be regarded as a universal human right clearly illustrates the consequences of holding personal autonomy as the law's fundamental precept. An examination of the arguments employed to justify abortion yields the conclusion that if the concept of universal rights is to have any meaning whatsoever, there can never be a human "right" to abortion.

### **The Logical Impossibility of Abortion as a Human Right**

#### *Abortion and the Logic of Morals*

We began this chapter with Michael Ignatieff's discussion of the essence of human rights and what we may reasonably expect them to accomplish. Despite his refusal to provide a normative explanation of human rights, Ignatieff unwittingly stood as a witness to the fact that the concept of human rights by its definition implies a common human nature. Through his description of the terrifying world of the concentration camp, Primo Levi presents an eloquent testimony to the meaning of human dignity. We found that the understanding of dignity implicit in Levi's account is the same as that contained in St. Thomas's explanation of natural law. These two men, speaking from very different cultural traditions, nevertheless agree that to be human is to understand oneself as existing in relation to a greater whole.

True universality is possible only on the level of the more general first principles of natural law. Again, on this level, rights correlate precisely with duties. X's right to

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The campaign for abortion as a human right is not only a contradiction of the human right to life, but also undermines what should be the protection of the family. In their drive to eradicate all barriers to abortion, some abortion rights advocates also seek to reduce the role of parents in children's lives by eliminating requirements for parental consent for abortions for minors, noting that "it is often in the best interest of the child to be granted autonomy in decision-making." (See Smith, *Congressional Record*, E2536).

life, for example, is exactly correlated with Y's duty to refrain from killing X. The only "rights" that can properly be called universal in this sense are those concerning the protection of innocent life and the prohibition of any practice that directly impedes one's ability to be virtuous. While determining the content of the latter category of right is certainly important, it is more urgent that we concentrate on the human rights revolving around the protection of life. For as we learned from St. Thomas, *being* is the foundation of goodness and hence the essential ground for enjoying any other human rights. This is all the more pressing to address given the fact that the idea of life as an absolute value is very much in dispute these days. Thus, a natural law defense of human rights necessarily begins with the protection of life itself.

Nobody would seriously dispute that the Holocaust was a violation of human rights. Far more contentious is the notion that there can be no human "right" to an abortion. But why should this be so contentious? Indeed, why is the subject of abortion so often deemed "off-limits" in polite company? Why do most politicians avoid the topic whenever possible rather than, in the manner of true statesmen, help articulate the terms of the public debate? In part, this is because, beginning with *Roe v. Wade*, abortion, like any other controversial moral issue, has been relegated to the status of an "inscrutably religious or 'theological' matter." Thus, Blackmun could write in his majority opinion in *Roe* that the Court "need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy

and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."<sup>71</sup>

As we saw in Chapter 1, this argument contains the fallacy that lack of agreement proves that truth does not exist. Hadley Arkes notes that this type of thinking is a result of the "tendency in our public discourse to equate moral questions with matters of religious faith or private belief, which cannot be judged finally as true or false. It was as though abortion, as a profound moral question, was somehow cut off from the prospect of weighing evidence and testing arguments by the canons of principled reasoning."<sup>72</sup> What this dissertation has hopefully shown heretofore is that moral questions, or at least, questions regarding the most fundamental moral precepts are not outside the purview of law, but are rather part and parcel of its order and operation.

From the standpoint of natural law, there cannot be a universal human right to an abortion for two reasons: First, as an act which involves the taking of innocent human life, abortion violates the principle of being, which is the foundation of human good. Life, or being, is the prerequisite for all other human goods. As such, it is a paramount value, and cannot be taken in the name of any lesser good (the principle of self defense does not really apply to abortion, as will be explained momentarily).

Second, abortion can be justified only by an argument that violates the principles of

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71. Quoted in Arkes, *First Things*, 360.

72. Ibid., 360. Also see Arkes, *Natural Rights and the Right to Choose*, p. 167, where he notes that by identifying abortion as a "privacy" right, the court effectively said that "whether the laws on homicide will be extended or contracted, to protect children in the womb or leave them unprotected, is no longer part of the legitimate business of the polity . . . But if the laws on homicide, or the protection of life, are not part of the purpose of a polity, or central to its legitimate business, what purposes on earth could be more apt or central?"

morals; that is, an argument whose justification stands in contradiction to the very principles that uphold human rights themselves. Let us begin with the first objection to abortion.

Although abortion proponents might, at one time, have been able to profess ignorance as to when life begins, modern science has effectively rendered this stance intellectually implausible. Indeed, even the most ardent abortion opponents do not really deny that a human life is exterminated in abortion. As Hadley Arkes notes:

The proponents of abortion have steadily held back from proclaiming abortion as a positive good; they have defended abortion only as a regrettable “choice,” which must be preserved for the woman who is pregnant. But why the holding back? The ground of reluctance has been plain: There cannot be any serious scientific doubt that the offspring of homo sapiens is anything other than homo sapiens. The partisans of “choice” cannot pretend that abortion does anything but extinguish an organism that is living and growing – otherwise there would be no need for this surgery. Nor can they pretend that the life growing in the womb of a woman is anything other than a human life. Hence, the conclusion, announced with the proper gestures of strain: that this is a hard decision, a judgment that brings to bear all of our moral hesitations and sensitivities, and yet a judgement that should be, in the end, the woman’s choice to make. The accent on choice, the strain to cast the problem in that neutral way, makes sense only with the awareness that a human life is at stake. Even if the proponents of choice will not admit the evidence of embryology, they concede at least that it is quite plausible for others to think that these surgeries destroy human lives.<sup>73</sup>

The principle of self-defense does not really apply to abortion; for deadly force is permissible only when one’s life is in immanent danger. Even a normal pregnancy carries certain risks, but it should be recognized that there is virtually no condition in which having an abortion is necessary to save one’s life. Even one of the foremost

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73. Arkes, *Natural Rights and the Right to Choose*, 30.

proponents of abortion, Dr. Alan Gutmacher, could concede as early as 1967 that “it is possible for almost any patient to be brought through pregnancy alive unless she suffers from a fatal illness such as cancer or leukemia; and if so, abortion would be unlikely to prolong, much less save life.”<sup>74</sup> The treatment of certain medical conditions, like tumors or ectopic pregnancy, may require the removal of the uterus, which would unintentionally result in the death of the fetus, but this would not be the primary intention for operating, and therefore the doctrine of double effect comes into play.

Nor can abortion be justified in the case of a pregnancy resulting from rape, for the law that sanctions this places a disproportionate burden on the fetus. As Dr. Bernard Nathanson (an early leading advocate of legalized abortion who changed his mind and became pro-life) notes in the case of children conceived in rape: “If a part of the human community were not at stake, no woman should be required to undergo the degradation of bearing a child in these circumstances, but even degradation, shame and emotional disruption are not the moral equivalent of life. Only life is.”<sup>75</sup>

Once it is admitted that abortion does exterminate life, the only way to defend it is by supposing that the life it takes is not as morally significant as the lives of other human beings. To hold this view, however, is to suppose that the fetus, at some point, “acquires features that are essential to its standing as a human being.” But human development is continuous; “each step along the way will bring a further articulation of

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74. Quoted in Arkes, *First Things*, 398. Furthermore, as of August 2, 2003, 418 physicians were signatories to a statement by the American Life League which stated “I agree that there is never a situation in the law or in the ethical practice of medicine where a preborn child’s life need be intentionally destroyed by procured abortion for the purpose of saving the life of the mother.” (available from: <http://www.all.org/about/decapp03.htm>, accessed August 2, 2003).

75. Nathanson, Bernard N., M.D. with Richard N. Ostling, *Aborting America* (Garden City, NY: Doubleday and Company, Inc., 1979), 238.

what is built into the nature of the offspring.”<sup>76</sup> At no point in our development do we change *substantially* into a human being from something else. The fully grown Professor Graber who stands before the class teaching Constitutional Law is the same Mark Graber who was once an adolescent, child, infant, fetus and embryo. He may have become smarter, stronger or taller along the way, but each of these features are simply additional qualities, or accidents, that further individuate him from other human beings.<sup>77</sup> Life is a continuum, and at no point along the way do we change from one substance into another. Now, while a fetus may be a potential teacher, doctor or plumber, he is never a *potential* human being in the way that a pile of wood is potentially a house.<sup>78</sup> The fertilized egg, unlike the pile of wood, contains within itself the principle of its movement, and cannot possibly develop into anything other than a human being.

This brings us to the second reason why abortion cannot be a human right. For once we begin to distinguish between different “types” of human life, as opposed to considering life simply, we have fallen into a state where we are no longer logically equipped to discuss human rights. Arkes again:

If we can arbitrarily alter the definition of a ‘man’ as it suits our convenience, if nature provides no definition of a human being that we are obliged to respect, then . . . we remove the distinct ground of our claim to ‘natural rights.’ But if we do that, if we remove ‘natural rights,’ we would convert all rights into rights of ‘positive law.’ With that subtle shift, we would have removed, in effect, the very logic and

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76. Arkes, *First Things*, 364-65.

77. Robert George offers a similar illustration in his *In Defense of Natural Law* (Oxford: Oxford University Press, 1999), p. 212.

78. Arkes, 364-65: “The force of that proposition seems to strike us more fully after birth, for we are not inclined to suggest that people cease to be human when they suffer the loss or impairment of these faculties.”

substance of rights. For what we call ‘rights’ then are simply the things declared to be right by the opinion that is dominant in any place. In that event, the ‘rights’ enacted into law are merely the rights that a majority is willing to confer. But what the majority may confer, the majority may also remove when it no longer strikes the majority as right or convenient.<sup>79</sup>

Remember that regardless of what proponents of universal rights would like such rights to accomplish, or why they think people have them, human rights -- defined as rights every person holds by virtue of their humanity -- are in every sense of the word natural rights; they are rights inhering *naturally* in our human nature, independent of government fiat. To claim a universal “human right” to an abortion, requires denying the humanity of the subject of the abortion. This in turn requires the reliance on an arbitrary definition of “human,” which contradicts the very logic by which we make sense of rights in the first place. Rights exist for the purpose of enabling the weak to invoke claims against the powerful elements of society. To suppose that the meaning of “human being” is not a self evident truth but is rather determined by dominant opinion, positive law, or some other criterion, is to employ a rationalization that is not substantially different from that invoked to support slavery. Therefore, it is helpful to consider a syllogism Lincoln posed concerning the logic of slavery:

You say A. is white, and B. is black. Is it color then: the lighter having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your own.

You do not mean *color* exactly? – You mean the whites are *intellectually* the superiors of the blacks, and therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.

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79. Arkes, *Natural Rights and the Right to Choose*, 31.



But, say you, it is a question of interest; and, if you can make it your *interest*, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.<sup>80</sup>

If the *homo sapiens* occupying the womb has a lesser claim to life because it is dependant on its mother for sustenance, than so does every other infant, as well as those who are too disabled to care for themselves. If *homo sapiens* in the womb has a lesser claim to life because it is not yet capable of being autonomous, then neither should this claim be extended to the person who is in a coma, mentally handicapped, or for that matter, sleeping. In fact, there is no argument for denying life to the being in the womb that cannot also be applied to any other member of the human race at various times in life.

As a matter of logic, the case against abortion seems fairly elementary. We noted above that most serious thinkers do not deny that abortion extinguishes life; they simply assume that the life claimed by abortion is not one worthy of the full protection of the law. This view predominates in American universities. Abortion law, rightly or wrongly, has been largely framed by the federal judiciary, which is highly influenced by

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80. Abraham Lincoln as quoted in Arkes, *Natural Rights and the Right to Choose*, 83.

those in academia, whether through books, lectures or amicus curiae briefs.<sup>81</sup> The opinions of those in academia are important, for besides influencing their students, academics help to shape the minds of judges and lawmakers, who in turn shape the law, which in turn shapes the public mind. Therefore, let us now turn to three legal scholars to consider the argument for abortion as a fundamental right.

*Whose Life is it, Anyway?*

One particularly influential book, by the eminent Ronald Dworkin, is *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*. Although Dworkin asserts time and again that abortion is a waste of human life, his argument is thoroughly pro-abortion. It is based on two premises: that a fetus is not a person, and therefore, not protected by the Constitution; and that abortion is a “religious” issue, and therefore irreconcilable with reasoned debate.

Dworkin suggest that much of the abortion deadlock revolves around the mistaken notion that people are arguing over whether a fetus is a person with rights and interests, thus making the abortion controversy “more confrontational and less open to

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81. For an example, see Wesley J. Smith, *Culture of Death: The Assault on Medical Ethics in America* (San Francisco: Encounter Books, 2000), p. xii. Smith says that in the 1999 case *James H. Armstrong, MD v. The State of Montana*, the Montana Supreme Court invalidated a state law that would have required that only doctors perform abortions, and issued a “radical philosophical imperative” that could be reasonably be interpreted to mean that almost any medical procedure (like unnecessary amputation or physician assisted suicide, to name a few ) is permitted “if it can be construed to involve obtaining ‘medical care from a chosen health care provider.’” He notes: “The primary authorities that the majority relied upon in expanding the reach of its ruling were philosophical treatises. Indeed, the most frequently cited authority was not a statute, a law case, or even a legal essay, but a philosophical discourse on the modern meaning of the ‘sanctity of human life’ contained in a book . . . by the influential attorney/bioethicist Ronald Dworkin. . . The Montana majority opinion cited *Life’s Dominion* so frequently and applied its reasoning so enthusiastically that it is no exaggeration to say the decision transformed Dworkin’s philosophy into the court-mandated health care public policy of the entire state of Montana, without a single citizen or legislator having the opportunity to cast a vote.”

accommodation than it should be.”<sup>82</sup> In fact, Dworkin says, there are two arguments against abortion – a “derivative objection” that says abortion is wrong “because it violates someone’s right not to be killed” and a “detached objection” which “does not presuppose any particular rights or interests” but assumes that “government has a detached responsibility for protecting the intrinsic value of life.”<sup>83</sup>

The scalding rhetoric of the “pro-life” movement seems to presuppose the derivative claim that a fetus is from the moment of its conception a full moral person with rights and interests equal in importance to those of an other member of the moral community. But very few people – even those who belong to the most vehemently anti-abortion groups – actually believe that, whatever they say. The disagreement that actually divides people is a markedly less polar disagreement about how best to respect a fundamental idea we almost all share in some form: that individual human life is sacred.<sup>84</sup>

Most people, Dworkin says, don’t really view the fetus as a person or they would not think there is ever a situation in which abortion should be legal. He argues that most people oppose abortion because it takes a life, rather than for the reason that it is murder.<sup>85</sup> In other words, abortion may take life, but it does not take life away from some *one*; hence, opposition to abortion is a “detached” objection, for “life” is apparently a principle to be respected rather than something that adheres to *particular* persons. And rights, of course apply not to principles, but to persons. Dworkin helpfully points out that most religious denominations oppose abortion using the

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82. Dworkin, Ronald, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books, 1994), 13.

83. *Ibid.*, 11.

84. *Ibid.*, 13.

85. *Ibid.*, 13-14.

terminology of the sanctity of life, rather than that of rights.<sup>86</sup> He admits that the Catholic Church is an exception to this rule (one might think this is significant to the point Dworkin is trying to make, given that Catholicism is one of the world's largest religious denominations, if not the largest) for it maintains that "every human being" has a "right to life from physical integrity from the moment of conception until death."<sup>87</sup> But he discounts this position as being worthy of much consideration, since for most of its history the Church opposed abortion on the grounds that it violated the sanctity of life.<sup>88</sup>

Of course, it is worth noting here that the obsession with rights talk is a relatively recent phenomenon, and the fact that the Church has begun speaking in such language fairly recently is hardly a reason to discount what it says. We have already noted that in the modern age, rights terminology has become the *lingua franca* of moral discourse. And following the Supreme Court's enumeration of a "right" to abortion in 1973, perhaps it became more necessary to speak of fetal rights as a reminder that the abortion right sanctions the killing of another human being. Anyway, why should the idea that life is sacred be so very distinct from the notion that human beings have a right to live? Why would we believe it to be important that people have a "right" to life, if life does not hold some intrinsic value? In other words, does Dworkin's distinction between the derivative and the detached objection to abortion really make any sense?

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86. Ibid., 36-38.

87. Ibid., 39.

88. Ibid., see pp. 40-46.

Whether or not the distinction is plausible it is essential to Dworkin's argument. The law may value life, but it grants rights only to *persons*. Dworkin admits that abortion does take a human life, but it apparently does so only in some vague sense of the term – certainly, the life taken is not the life of a *person*. Only a person, Dworkin says, can have rights and interests protected by the law. Dworkin implies that although to destroy such a life (which, again, must not really belong to some *one*, but is rather representative of a vague *principle*) would be a “terrible insult” to its intrinsic value, a human in the womb has no more “interest” in not being destroyed than a “beautiful sculpture” or a “baby carrot.”

But why should we assume the fetus has no interest of its own? Dworkin implies that the fetus is essentially no different from a carrot or a sculpture because 1) Its growth is dependant on “external help, from a pregnant woman or from scientific ingenuity”; 2) It lacks self-consciousness; 3) It cannot “enjoy or fail to enjoy, to form affections and emotions, to hope and expect, to suffer disappointment and frustration;” and 4) Dworkin claims it cannot feel pain until mid-gestation.<sup>89</sup> Now, science has not yet conclusively determined when the fetus is able to feel pain, although this point is probably reached well before the time Dworkin sets.<sup>90</sup> But pain is really beside the point, after all. Employing Lincoln's syllogism here, we could note that if the permissibility of killing depended upon whether it inflicted pain, then homicide would be unobjectionable as long as the victim were anaesthetized in advance. As for 2), we

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89. Ibid.,16-19.

90. See Nathanson, Bernard, *The Hand of God: A Journey from Death to Life by the Abortion Doctor who Changed His Mind* (Washington, D.C.: Regnery Publishing, Inc.,1996), 142-43.

might note that even babies that are already born, and many other human beings as well, lack the type of self consciousness that Dworkin believes is requisite for personhood.

Nevertheless, Dworkin maintains:

The crucial questions are . . . When does a human creature acquire interests and rights? When does the life of a human creature begin to embody intrinsic value, and with what consequences? We do not have to decide whether a fetus is a full human being at conception, or at what point it becomes one, or whether that process is gradual or abrupt, to answer those crucial questions.<sup>91</sup>

Personhood for Dworkin hinges on three justifications: First, as we have already noted, a level of self consciousness sufficient to identify one's "interests;" second, what public opinion says a person is; and third, what the Constitution determines a person to be. Inevitably, as it must be when life itself ceases to be an absolute value, Dworkin's main justification for denying personhood to the fetus depends on what he perceives as the dominant public opinion. In fact, a consistent strand of Dworkin's thought, which appears at every turn in his argument, is that abortion is justified because regardless of what anyone says, everyone believes it should be permitted.

Again, it seems axiomatic to say that life, by definition, must belong to some *one*, but Dworkin prefers to regard life as somehow intangible and vague, noting that "it is in principle wrong to terminate a life even when no one's interests are at stake"<sup>92</sup> He concludes that the "real argument against abortion is that it is irresponsible to waste human life without a justification of appropriate importance."<sup>93</sup> Most of us, Dworkin

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91. Dworkin, 22.

92. Ibid., 34.

93. Ibid., 58.

supposes, don't disprove of abortion because it kills some *one*, but because it violates the sanctity of life:

Abortion wastes the intrinsic value – the sanctity, the inviolability – of a human life and is therefore a grave moral wrong unless the intrinsic value of other human lives would be wasted in a decision *against* abortion.<sup>94</sup>

It is comforting to know that sometimes abortion shows more respect for human life than giving birth. You see, Dworkin assures us, everyone really believes in the same thing – the sanctity of life. What we disagree on is what gives life its sanctity. “Almost everyone shares, explicitly or intuitively, the idea that human life has objective, intrinsic value that is quite independent of its personal value for anyone, and disagreement about the right interpretation of that shared idea is the actual nerve of the great debate about abortion.”<sup>95</sup> Thus, although “almost everyone accepts the abstract principle that it is intrinsically bad when human life, once begun, is frustrated, people disagree about the best answer to the question of whether avoidable premature death is always or invariably the most serious possible frustration of life.”<sup>96</sup> What makes life “sacred,” then is more determined by the subjective beliefs of people than by any objective standard. Of course, once we deny that human life has any overriding, nonderogable value, the door to killing in all kinds of other contexts is opened up, as Dworkin demonstrates later in his book when he argues for euthanasia.

For Dworkin, life is valuable in two ways: by reason of its “natural creation,” and (more importantly, as it turns out) by virtue of ‘the kind of deliberative human

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94. Ibid., 60.

95. Ibid., 67.

96. Ibid., 90.

creative force that we honor in honoring art.”<sup>97</sup> Thus, life’s real worth depends on its being the “product of human creative intelligence, partly that of “parents and other people,” partly that of “culture,” and also through the “choices” one makes, thereby through one’s own self-creation.<sup>98</sup> In agreement with the principles set afoot by Locke, Dworkin values the personal investment that goes into life more than life itself, for he says “It is terrible when an infant dies but worse, most people think, when a three-year-old child dies and worse still when an adolescent dies.”<sup>99</sup> This sort of logic probably makes sense only to someone who has never lost an infant or a three-year-old child. And as one critic notes, if the value of human life is a subjective matter, why not suppose that the newer life is worth more, being less constrained by personality and choices already made?<sup>100</sup>

Here, as in many other places throughout the book, Dworkin relies very heavily on what he says most people believe. In fact, most of the time he implies that he is not so much constructing his own argument as he is simply articulating majority opinion. How Dworkin has determined that this is what “most people” think, or whether he has ever sought opinions outside of his particular philosophical circle is not clear. But his main point is obvious: The human in the womb cannot really be a person with rights

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97. Ibid., 82.

98. Ibid., 82.

99. Ibid., 87.

100. See Smith, *Culture of Death*, 19.



and interests of its own, because nobody really thinks that it is.<sup>101</sup> But denying the personhood of the fetus on the grounds of public opinion results in a tautological argument: because we don't believe the fetus is a person we condone abortion in at least some of the time, and because we condone abortion at least some of the time we do not regard the fetus as a person.

This tautology points to a larger problem with Dworkin's argument. He explains early on that his book is an attempt to do "philosophy from the inside out:"

Theory can connect with practice . . . from the outside in: we can construct general theories of justice or personal ethics or constitutional interpretation from general assumptions about human nature or the structure of language or thought, or from first principles of some other character, and then try to apply those general theories to concrete problems. Or we can . . . begin with practical problems, like the question of whether the law should ever permit abortion or euthanasia, and if so in which circumstances, and then ask which general philosophical or theoretical issues we must confront in order to resolve those practical problems.<sup>102</sup>

Philosophy done from the outside in would begin with the principle that "innocent human life must not be taken," and from that, conclude that abortion, in taking innocent life, is wrong. Dworkin's approach, consists of taking a position -- "I believe

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101. Dworkin, 97. Dworkin supports this assertion by noting that many people who hold "pro-life" views nevertheless condone abortion in the case of rape. Here we must agree with Nathanson and note that it is not logically consistent, of course, to make exceptions in the case of rape, for that misses the point of the objection to abortion. It would shift the grounds of the argument from upholding the sanctity of life or the right to life to that of taking responsibility for one's actions. And although the victim of the rape deserves all the material and emotional support society can muster, such support cannot logically extend to taking the life of what is, after all, an innocent party. See Hadley Arkes, *First Things*, pp. 395-96: "No one could pretend that the fetus, in these circumstances, would be anything other than the innocent issue of the act. What remains to be explained is why so many worldly people are willing to visit on this innocent party a punishment far more astounding than the punishment they see fit to impose on the assailant himself. People who would never sanction capital punishment for the rapist are nonetheless willing to inflict a lethal operation on the innocent issue of the rape . . . the injuries in prospect for the mother cannot possibly stand on the same plane as the injury that would be inflicted on the fetus through an abortion."

102. Dworkin, 29.

abortion is permissible” – and then seeking justification for that position by constructing a world view that is compatible with it. Theoretically speaking, this has the effect of attempting to conform reality to our individual desires, rather than the other way round.

Dworkin’s approach is that, rightly or wrongly, most people believe that abortion should be legal, so the law should permit it. But even if we assume Dworkin’s assessment of public opinion is correct (and it is far from clear that it is), we should recognize that public opinion does not form in a vacuum; the law is a great teacher. The fact that a practice is endorsed by the law is a crucial first step toward its being accepted by the public. Dworkin bases much of his argument about abortion on the opinions he says people hold. Yet before Americans today condone abortion at much higher rates than they did before it was legalized. When the highest court in the land sets standards, the public is eventually influenced.

So far, Dworkin’s most compelling case for denying the personhood of the *homo sapiens* before birth rests on what he says “most people” think. He then turns to the Constitution for support. In approaching the subject of constitutional interpretation, Dworkin contrasts the view of a “constitution of *principle*” which “lays down general comprehensive moral standards that government must respect but that leaves it to statesmen and judges to decide what these standards mean in concrete circumstances” with a “constitution of *detail*” which must be interpreted according to “only the very specific, concrete expectations of the particular statesmen who wrote and voted for them.” The former view, Dworkin says, is an “exhilarating, stirring vision of political

community,” while the latter is simply a “collection of independent historical views and opinions unlikely to have great unity or even complete consistency.”<sup>103</sup>

Dworkin suggests that opposition to abortion is necessarily grounded in the latter, strict constructionist view of constitutional interpretation.<sup>104</sup> Although it may be true that many judges frame opposition to *Roe v. Wade* in those terms, thereby arguing that the legalization of abortion should be left to the determination of the states, is that necessarily the only criterion for judging that the ruling in *Roe v. Wade* was incorrect? In fact, Dworkin sets up a false dichotomy by holding that one is either a strict constructionist and therefore against abortion, or one believes in a constitution of principle, and therefore must support abortion as a constitutional right. But why must the constitution of principle view necessarily support abortion? Could we not suppose that justices should be free to interpret the constitution, but not to declare, as a fundamental right, something that is in direct opposition to the nation’s founding principles?

Dworkin suggests that trying to gage original intent is a needlessly complex and confusing task, and in any case, is not necessarily a helpful tool for determining how to apply Constitutional principles to cases today. He explains:

(The Framers) intended to commit the nation to abstract principles of political morality about (for example) free speech and due process and proper punishment and equality. They themselves had various concrete, detailed opinions about the correct application of these abstract principles to particular issues. Today’s judges may think that the Constitution’s authors were mistaken in some of these concrete opinions, and that they did not reach correct conclusions about the effect of their

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103. Ibid., 119.

104. Ibid., 124.

own principles. Today's judges may believe, in other words, that the author's abstract and concrete convictions were in conflict; if so they, the judges, must decide themselves which to follow.<sup>105</sup>

So if the specific views of the Framers were in conflict with any of the Constitution's general foundational principles (as in the case of slavery, for example), then it would seem reasonable to interpret the law by the light of the general principle rather than by the Framers' specific views. In a similar vein, although the ratifiers of the Fourteenth Amendment may have supported school segregation, it makes perfect sense for a later generation of judges to use the Fourteenth Amendment's general provisions for racial equality as a basis for striking down segregation laws. With much amazement, Dworkin cites a passage from Robert Bork that supports this view of interpretation, which is the view Dworkin himself endorses. In that passage, Bork says:

In short, all that a judge committed to original understanding requires is that the text, structure and history of the Constitution provide him not with a conclusion but with a major premise. The major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows.<sup>106</sup>

Dworkin says that Bork's analysis "comes to this: the Constitution enacts abstract principles that judges must interpret, as best they can, according to their own lights." By this, however, Dworkin apparently means that judges must interpret the law, not according to the main premises of the Constitution, but on the basis of their own political opinions. Thus, he says, Bork supports the Court's decision in *Brown*,

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105. Dworkin, 137.

106. Robert Bork, as quoted in Dworkin, 141.

which outlawed school segregation, even though this was not a specific aim of the framers of the Fourteenth Amendment's equal protection clause, simply because "he is personally convinced that racial segregation is a piece of unjustified discrimination."<sup>107</sup> Dworkin then charges Bork with a criticism that he would be hard pressed to avoid himself: he says that once one "abandons the reductive strategy that limits the force of the equal protection clause to its authors' own specific convictions, then he has no other means of checking the abstract language. He is in a kind of free-fall, in which originalism can mean anything and the only check on his judgment is his own political instinct."<sup>108</sup>

In fact, the passage cited by Dworkin suggests something different; one not unlike the process of natural law reasoning: Perhaps Bork is simply saying that one must interpret the Constitution according to its fundamental principles. So when applying the Constitution to a particular case, one cannot reason properly to a conclusion that contradicts a major premise, much as, in natural law holds that one cannot reason properly from primary principles to secondary principles that are in conflict with those. It may be safe to say, as Dworkin does, that the Framers intended to supply future generations not with concrete opinions, but with abstract principles by which to govern. But it is also true that the founding generation was probably better equipped than many of today's judges to reason correctly. Dworkin says that we must "seek genuine constraints in the only place where they can be found: in good

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107. Dworkin, 141.

108. *Ibid.*, 143.

argument.”<sup>109</sup> But as Arkes points out, many of those occupying the bench today have been educated in ways that have deprived them of the ability to engage in moral reasoning.<sup>110</sup> And yet, this ability is precisely what Dworkin relies upon, for he says that “if two different views about the best interpretation of some constitutional provision” are in conflict, “we should prefer the one whose principles seem to us best to reflect people’s moral rights and duties, because the Constitution is a statement of abstract moral ideals that each generation must reinterpret for itself.”<sup>111</sup> But, keeping true to his “inside out” philosophy, Dworkin does not apply this principle to all cases across the board, but only those that he supposes confirm his preexisting opinions.

Take, for example, the due process and equal protection clauses of the Fourteenth Amendment, under which no state “shall 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.” It is true that nothing in the Fourteenth Amendment specifically permits or prohibits abortion. What reason then, would there be, for privileging Dworkin’s position -- that the Fourteenth Amendment should be interpreted as permitting abortion -- over a position that would extend the protections of the Fourteenth Amendment to humans in the womb? It would seem that according to the premises Dworkin himself sets, a broad approach to constitutional interpretation should prohibit abortion, since in the case of conflicting interpretations, “we should prefer one

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109. Ibid., 145.

110. See Arkes, *Natural Right and the Right to Choose*, pp. 2-6 and p. 43.

111. Dworkin, 111.

whose principles seem to us best to reflect people's moral rights and duties." Is life not a more fundamental value than liberty, since it is the very basis of liberty? <sup>112</sup>

Perhaps sensing that a broad interpretation of the constitution might reasonably lead to this position, Dworkin, very ironically, then shifts his justification of abortion from the grounds of a "constitution of principle" to one based, in the style of a strict constructionist, on the beliefs and practices of the framers of the amendment. He says the amendment cannot be interpreted to prohibit abortion, for when it was adopted "many states had liberal abortion laws . . . but no court declared that these laws violated the equal protection clause . . . nor did any substantial number of politicians . . . suggest that these liberal laws were unconstitutional." Dworkin concedes that in the nineteenth century these laws were replaced by laws that "prohibited or strictly regulated abortion," but he is quick to note that these laws were probably adopted "not out of concern for fetuses" but "to protect the health of the mother and the privileges of the medical profession."<sup>113</sup> Furthermore, Dworkin adds, "the structure and detail of the anti-abortion laws show . . . that even the strictest states rejected the idea that a fetus is a constitutional person."<sup>114</sup>

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112. In arguing that the protections of the 14<sup>th</sup> Amendment should be construed as extending to humans in the womb, Nathan Schlueter notes: "The unborn person interpretation has nothing to do with broadening or narrowing legal concepts to meet ever-evolving standards of morality accessible only to privileged elites. In such cases judges usually broaden or contract the meaning of the legal concept itself, as when they argue, for example, that the right to 'liberty' includes an absolute right to engage in behavior once regarded as legitimately subject to state 'police power' regulations . . . In (this case) the legal concept – the protection of all human beings – remains unchanged. The only change comes from the clear development in scientific knowledge about when human beings come into existence." (Schlueter, Nathan and Robert Bork, "Constitutional Persons: An Exchange on Abortion," *First Things*, No. 129, January, 2003, p. 33.)

113. Dworkin, 111-112.

114. *Ibid.*, 112.

So although he has resoundingly criticized the idea of the need for interpreting the constitution in light of the beliefs and intentions of its framers, when it comes to abortion that is not the case. Even if we grant as true Dworkin's questionable supposition that anti-abortion laws had little to do with concern for the unborn, it is hard to see why attitudes regarding abortion at the time of the framing should still be considered authoritative today (especially in light of scientific advances in identifying the beginning of life), when other practices that existed at that time, like school segregation, are today rightly deemed to be forbidden by the equal protection clause. Dworkin adds finally that "even the most stringent laws did not punish abortion as severely as they did ordinary murder . . . it was simply assumed that even in principle abortion is not so serious a matter as murder."<sup>115</sup> To this one might respond that the law does not punish manslaughter as seriously as first degree murder, but in both cases it acknowledges the existence of a body on the floor, so to speak. In short, Dworkin enthusiastically supports interpreting the constitution according to what he deems the more advanced knowledge and principles of our time. Yet when considering abortion, he looks not to the many recent scientific advances that confirm the presence of life in the womb, but rather to the opinions and practices of those living in the nineteenth century.

Furthermore, Dworkin admits that "the Supreme Court sometimes upsets conventional understanding about what the Constitution requires" and cites *Brown* and *Roe v. Wade* as examples of this. "But in each of these cases, the Court could appeal to

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115. Ibid., 112.



established, more general constitutional principles that plausibly condemned the practices it held unconstitutional. It could claim, that is, that the legal history was inconsistent. In each case, moreover, substantial legal and public opinion had already been converted to the new opinion the Court endorsed.”<sup>116</sup> The effect of this is as follows: First, Dworkin, citing state practice and common opinion in the nineteenth century, says that the Court’s decision in *Roe* is plainly supported by the Fourteenth Amendment. Then he admits that *Roe* was a case of the Court’s upsetting “conventional understanding” in this regard, which implies that most people did not consider abortion to be a right guaranteed by the Fourteenth Amendment. Thus, state laws regulating abortion must be construed as “inconsistent” with *Roe*’s more “enlightened” interpretation of the Fourteenth Amendment. And in such cases, Dworkin notes, judges must rule on the basis of constitutional generalities, or the moral principles contained therein. But again, nowhere in the constitution is liberty privileged over life. Dworkin then claims that in *Roe*, the Court endorsed what was already the reigning public opinion anyway. But if this is the case, how did the Court upset any “conventional understanding?” In fact, before *Roe v. Wade*, a greater segment of the public was against, rather than in favor, of abortion.<sup>117</sup>

But even aside from these considerations, Dworkin’s familiar habit of falling back onto what he says “most people believe” suggests that public opinion is itself the light by which the Constitution must be interpreted. Dworkin suggests that the courts, when issuing opinions, are really speaking for most people, or at least, most reasonable

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116. Ibid., 112.

117. See Arkes, *First Things*, 394.

people. He notes, for example, that the Court could have declared the fetus a constitutional person only by asserting that it is “so plainly a person in the moral sense - - is so plainly a human being with rights and interests of its own that should be protected by rights” but that this “proposition is scarcely intelligible, and very few people believe it.” Furthermore, Dworkin notes, all “responsible” people, even critics of *Roe*, agree with Blackmun that a fetus should not be a constitutional person. (Why this makes somebody who disagrees “irresponsible” Dworkin does not say) Anyone who disagrees with Blackmun’s decision commits the double sin of relying “not only on a moral conviction but on a particularly odd and unpopular one.”<sup>118</sup> Of course, one might respond here that the very idea of a moral principle is that it is true regardless of whether many, or most people endorse it. Principles have no meaning at all if they are based on the shifting sands of public opinion. We might also question the idea of distinguishing between what we acknowledge to be pre-born humans and humans who are persons in the “moral sense” and note that never in our nation’s history except in the case of slavery was such systematic violence toward an entire group of humans condoned on the basis of their not being persons in “the moral sense.”

Dworkin says that “the legal history that so strongly influences constitutional interpretation is not directly relevant to moral questions” noting that Blackmun “pointed out in his opinion in *Roe v. Wade*, for example, that American law had never in the past treated fetuses as constitutional persons. That is a strong argument against interpreting

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118. Ibid., 112.

the Constitution to include them at the present day.”<sup>119</sup> It would seem, then, that Dworkin’s support of the Constitution as “a statement of abstract moral ideals” applies only when it will lead to an outcome that he personally supports. If such an approach might lead to an outcome that Dworkin does not like, such as prohibiting abortion, then Dworkin says we must look, not to moral principles, but rather, to how the law has treated such persons in the past. Dworkin’s “inside out” philosophy, which has the convenient effect of rationalizing whatever opinions one may happen to hold, is powered by an upside down logic whereby personal opinion is the standard against which the first principles of morality must be measured.

After arguing that Constitutional interpretation has offered no support for the personhood of unborn humans in the past, the next step is to deny the possibility of it ever doing so in the future by labeling abortion a “moral” issue, which, according to Dworkin, means it is “religious” and therefore beyond the province of the law. He says that abortion views are always formed by religious beliefs:

We may describe most people’s beliefs about the inherent value of human life – beliefs deployed in their opinions about abortion – as *essentially* religious beliefs . . . How then shall we classify a belief as religious? . . . by asking whether it is sufficiently similar in content to plainly religious beliefs. On that test, the belief that the value of human life transcends its value for the creature whose life it is – that human life is impersonally and objectively valuable – is a religious belief, even when it is held by people who do not believe in God.<sup>120</sup>

On these grounds, we would be hard pressed to identify many political beliefs that are *not* religious, since the basic prohibitions that are essential to law -- against

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119. Ibid., 110.

120. Ibid., 155-56.

killing, stealing and the like -- have already been enumerated in the Ten Commandments. Dworkin's argument is, of course, all part of the same confusion that Arkes identifies as resulting from the mistaken notion that to speak in terms of morality is to speak in terms of religion, something Americans do not do in polite company. Almost as a failsafe measure in the event his argument for abortion is not accepted, Dworkin conveniently sets up the conflict as being between two religious beliefs; noting that whether one believes life has dignity because God created it or because of the "intrinsic importance of human creative investment" the belief "affirms an essentially religious idea, that the importance of human life transcends subjective experience."<sup>121</sup>

Dworkin here is simply making a point that Arkes made earlier – that to think and speak in terms of moral absolutes is part of what it means to be human. But in consigning moral language to the area of inscrutable religious beliefs, Dworkin not only handily removes the issue of abortion from public discussion, but also finds new grounds to defend it – for if someone desires an abortion due to their "religious" beliefs, then it must be protected by the First Amendment, since "a state has no business prescribing what people should think about the ultimate point and value of human life, about why life has intrinsic importance, and about how that value is respected or dishonored in different circumstances."<sup>122</sup> He adds that "it would be remarkable if so basic a right did not figure in the best interpretation of constitutional liberty and equality as well" since the right is "fundamental to the concept of ordered liberty."<sup>123</sup>

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121. Ibid., 156-57.

122. Ibid., 164-65.

123. Ibid., 166.

We might plausibly ask here why abortion needs to be construed as “religious” at all, when, as a moral issue (just like any other form of killing) it can be so easily talked about using the logic of morals. Why not discuss it on the grounds of logic, noting that if we have the right to take innocent lives in some contexts there is no logical reason to oppose killing in other contexts? Dworkin admits over and over that the fetus is a “human life” if not a “human being.” Opposition to abortion does not need to be grounded in any other basis but the moral principle that innocent human life may not be killed. For all their insistence that opposition to abortion can be grounded only on the basis of religious belief, proponents of abortion like Dworkin, ironically, are the ones who must avoid recourse to plain logic, relying instead on convoluted metaphysical argument to justify what they admit is an act of killing. But even if we were to consider abortion as a “religious” issue, this does not necessarily prevent the law from regulating it. The law prohibits polygamy, after all, as well as the killing of human beings in other religious rituals. Why should it permit abortion out of respect for someone’s “religious” beliefs?

In the end, Dworkin implores people to have a higher regard for human life than that suggested by the high numbers of abortions performed each year: “If people did *not* think it transcendentally important that human lives not be wasted by abortion, then they would not have the kind of commitment my argument assumes most people do have.”<sup>124</sup> So the success of Dworkin’s argument ultimately depends on people holding a belief (namely, that abortion is wrong) that is in opposition to its premises. For Dworkin, and

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124. Ibid., 167.

probably, most other abortion proponents, legal abortion is the essential component to complete procreative autonomy. But he admits that it is important that people do not routinely resort to abortion as a procreative liberty, but instead think it “transcendently important” that lives not be wasted. More transcendently important than enjoying unlimited, unhindered sexual liberty? If that is his view, would it not be better served by a law that sets limits on abortion rather than providing it on demand, for any reason whatsoever?<sup>125</sup> As Dworkin surely knows, the law is a teacher. The standards it sets do eventually filter out into the public consciousness. Are there any other instances where society would be better served by disregarding what are held to be the fundamental principles of the law?

#### *Abortion as “Self” Defense*

We have identified abortion as an offense to being, or life, and as specifically wrong based on the principle that innocent life must not be taken. But what if the life taken is not so innocent after all? That is the premise of *Breaking the Abortion Deadlock: From Choice to Consent*, in which Eileen L. McDonagh defends abortion on new grounds. Dworkin tried to construct a justification for abortion that admitted the humanity, but denied the personhood, of the preborn human. McDonagh goes a step

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125. See Hadley Arkes, *Natural Rights and the Right to Choose*, pp. 87-88. He notes that the “trimester scheme” of *Roe* has been effectively overridden by *Doe v. Bolton*, in which the Court insisted that any state regulation of abortion “could nevertheless be overridden or trumped by a concern for the ‘health’ of the pregnant woman. That notion of ‘health,’ however, would follow along the definition of health provided by the World Health Organization (WHO): it would encompass a concern for the ‘mental health’ of the woman, along with her physical well being. But as Professor (and later, federal judge) John Noonan pointed out at the time, that meant that a woman had a right to order up an abortion if she thought she would genuinely suffer distress if she were denied one.” Practically speaking, from very early on, the right to abortion has never really been restricted.

further in admitting its personhood, but she condones abortion anyway. The key question, she says, is not whether the fetus is a person, but whether a woman has the right to consent to what a private party (the fetus) does to her body when “it causes pregnancy.”<sup>126</sup> She views pregnancy not as the direct result of sexual intercourse but rather the result of a “fertilized ovum” implanting itself in a woman’s uterus. “Even in a medically normal pregnancy,” she explains, “the fetus massively intrudes on a woman’s body and expropriates her liberty.” If a woman does not consent to this, all manner of deadly force is allowable to stop the fetus, since “the latitude for the use of deadly force in self-defense in our culture and legal system extends beyond threats to one’s life alone and includes threats of serious bodily injury and the loss of liberty, as in rape, kidnapping or slavery.”<sup>127</sup>

The state therefore, is obligated not only to permit abortion, but to positively assist women in procuring them through funding. For “if the state removes abortion funding from health policies as a means for protecting the fetus as human life, then the state must also stop the fetus as human life from intruding upon the body and liberty of a woman.”<sup>128</sup> In this way, “by showing how the fetus’s status as human life actually justifies the use of deadly force to stop it from imposing wrongful pregnancy,” says McDonagh, “this book uses pro-life premises to get to pro-choice conclusions:”

Justifying abortion rights and funding on a consent-to-pregnancy principle does not require that the fetus be a subhuman entity. Rather, the pro-life premise that the fetus is a person strengthens rather than

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126. McDonagh, Eileen, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996), 6.

127. *Ibid.*, 7.

128. *Ibid.*, 8.

diminishes women's right to an abortion and also to abortion funding . . . the fetus' status as a person would confer no right to use another person's body without consent since no born person possesses such a right . . . this way of framing abortion rights does not necessitate devaluing the fetus by dehumanizing it. In this sense, it opens the door to greater, not less, respect for the fetus.<sup>129</sup>

McDonagh thus joins Dworkin in the happy conclusion that abortion actually increases respect for human life. Rather than dwell on such logical absurdities, let us consider the essential components for the validity of this argument: The fetus is a person. The fetus is a person who is a hostile aggressor, even if its aggression is unintentional. Deadly force is a justifiable response to this aggression, if it is undertaken without a woman's consent.

McDonagh scoffs at the common court and cultural emphasis on pregnancy as being different from other relationships "rather than developing the legal parallels between a pregnancy relationship and other types of relationships."<sup>130</sup> To what then, would we compare the pregnancy relationship? For McDonagh, the fetus is best compared to a rapist, an enslaver or an intruder.<sup>131</sup> Setting aside the biological fact that men and women who engage in sexual intercourse do cause a pregnancy, McDonagh claims that the real reason a woman becomes pregnant is "because the fertilized ovum implants itself in her body and maintains that implantation over a protracted period of nine months." She claims that the Court's failing to lay the sole responsibility of the

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129. Ibid., 12-13.

130. Ibid., 37.

131. In this way, McDonagh sets aside claims that abortion is similar to slavery, since "although the fetus is innocent of conscious intention and cannot control its behavior, it is not innocent of massively intruding on a woman's body and liberty. Far from being the slave that is sacrificed in an abortion, the fetus is the one that enslaves the woman when it imposes a wrongful pregnancy." p. 169



pregnancy on the fertilized ovum results in the notion of “*immaculate pregnancy*, that is, the view that pregnancy is a condition that simply ‘comes to a woman,’ without any clear identification of the physical agent that brings about this pregnant condition.”<sup>132</sup>

Yet it would seem that it is McDonagh’s definition that is more in tune with the notion of immaculate pregnancy, since in her view it is as if the woman did nothing whatsoever to contribute to the pregnancy. Indeed, for her a woman no more causes a pregnancy by her behavior than she causes a rape by walking down the street late at night.<sup>133</sup> McDonagh says that the fetus “is a vital, living, active entity with tremendous power. It alone has the power to transform a woman’s body from a nonpregnant to a pregnant condition.”<sup>134</sup>

McDonagh admits that the fetus is criminally innocent of its imposition on its mother since its actions are not conscious and willful. Nonetheless, its behavior “falls into that category of action in which the law assigns objective fault even without the presence of conscious intention.”<sup>135</sup> Like a mentally incompetent rapist, the fetus must bear responsibility for its crime. One may wonder whether, even if the fetus is to be construed as an invader or unwelcome guest, deadly force is an appropriate response when, after all, in the vast majority of cases the pregnancy will eventually end with no loss of life on the part of the mother. But McDonagh insists that “Nonconsensual pregnancy, like nonconsensual sexual intercourse, is a condition that must be stopped

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132. Ibid., 33.

133. Ibid., 43.

134. Ibid., 35-36.

135. Ibid., 36.

immediately because both processes severely violate one's bodily integrity and liberty."<sup>136</sup>

Based on this logic, one would have to wonder why an already-born human should be regarded any differently. It can be plausibly argued that newborn infants take a greater toll on their parents -- in terms of loss of liberty as well as physical and mental exhaustion -- than they do before they have been born. If any loss of liberty is the equivalence of violence that must be stopped, why not throw the baby out the window if you cannot wait for what might be hours for the adoption agency to come and take him away? Interestingly, for all the analogies that McDonagh employs to describe the personal relationship between a fetus and its mother -- from rapist to enslaver to someone who accidentally runs you over with a car -- she overlooks the most obvious analogy, if that is even a proper term -- the relationship between parents and their already-born offspring. But as we shall see, that is certainly the most appropriate way to describe what actually happens during a pregnancy.

Again, McDonagh's argument is based on two premises - the fetus has initiated the pregnancy and is therefore an aggressor, and the woman who does not consent to this may legitimately use deadly force to stop it. Let us consider the first claim more closely. McDonagh charges that pregnancy is "initiated and maintained" by the fetus.<sup>137</sup> She says the changes that occur to a pregnant woman's body are "portrayed by medical texts as a product of the fertilized ovum's intrusion and aggression." She then refers to a such a book, dubiously entitled *Preventing Birth: Contemporary Methods*

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136. Ibid., 12.

137. Ibid., 62.

*and Related Moral Controversies* which offers a description of the process of implantation by the “advancing fertilized ovum” peppered with verbs like as “penetrate”, “extensively colonize,” “destroy.”<sup>138</sup> McDonagh considers the changes pregnancy causes in circulation, cardiac volume and hormonal levels as “massive physical transformations” that are so damaging to bodily integrity and personal liberty that one is left wondering why abortion is not more common than childbirth.

In short, the justification for abortion is tied to the way that a fetus “coerces” a woman into being pregnant, and the notion that it is an “extraordinary injury if a woman does not consent to pregnancy, for the fetus “directly intrudes on and takes the bodies and liberty of others to meet its physical needs. While the survival of a born infant depends on others responding to its needs, the survival of preborn human life depends on its brute force capability to take from others what it needs, regardless of whether there is consent to give.”<sup>139</sup> Thus, “The fetus seriously injures her, even in a medically normal pregnancy, by forcing pregnancy on her against her will.”<sup>140</sup> If pregnancy is really as bad as all that, one would think society should positively discourage a woman from “consenting” to it, much as we would discourage a woman from “consenting” to remain in an abusive relationship.

But is the woman’s body really coerced into pregnancy? To coerce means primarily “to force to act or think in a given way by pressure, threats or intimidation.”<sup>141</sup> Does the body exhibit the same biological signs in pregnancy that it does when

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138. Ibid., 69.

139. Ibid., 141.

140. Ibid., 89.

141. *Webster’s II New Riverside University Dictionary*

threatened by some other invading force, like disease? In fact, just the opposite is the case: A woman's monthly cycle, in which fluctuating hormonal levels produce changes in cervical mucus and the uterine lining, exists for the sole purpose of receiving and nourishing a fertilized egg.<sup>142</sup> The woman's body itself determines whether there will be a fertilized egg at all, and if it will be accepted. In McDonagh's terms, this would have to be the equivalent not of simply provoking rape by dressing provocatively, but of physically initiating sexual relations with a man. During implantation of the fertilized egg into the endometrium, or womb, the woman's body in no way responds as it would to infection or any other invading force. Just the opposite, it does everything possible to accommodate the zygote and facilitate its implantation. So far from being an unwanted guest, the embryo couldn't implant at all without permission from the uterus:

Implantation is a highly coordinated event that involves both embryonic and endometrial participation. The endometrium expresses a sophisticated repertoire of proteins during the menstrual cycle many of which help to define a period of receptivity collectively known as the 'window of implantation.' Many of these factors, which are temporarily aligned with this window, are now seen as chemical messengers that are recognized by the embryo and facilitate embryonic growth and differentiation.<sup>143</sup>

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142. See "The Menstrual Cycle," (available from <http://www.ovulation-calculator.com/conception.htm>; Internet; accessed July 28, 2003; p. 1 of 3: "At ovulation, the layer of mucus in the cervix... becomes more fluid, allowing sperm to enter the uterus rapidly." At other times, cervical mucus is of such a consistency as to completely block sperm altogether. The woman's ovaries produce estrogen, which thickens the uterine lining and "increases blood flow to the uterus," and progesterone which "causes the glands of the uterine lining to form secretions that help nourish a fertilized egg." See also *The Merck Manual of Medical Information: Home Edition* (NJ: Merck Research Laboratories, 1997), p.1137: The cells lining the fallopian tube facilitate fertilization and the subsequent development of the fertilized egg (zygote).

143. Lessey, B.A., "Endometrial Receptivity and the Window of Implantation," *5 Baillieres Best Pract. Res. Clin. Obstet. Gynaecol.*, (Oct, 2000); abstract, available from [http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list\\_uids=11](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11); Internet; accessed July 28, 2003, p. 1 of 1.

Implantation is the result not of a hostile invasion, but rather the chemical factors involved in a process called “cell signalling,” “which involves the new human embryo and the cells of the lining of the womb chemically communicating with each other in order to “create an optimally advantageous endometrial environment at the time the human embryo attempts to implant.”<sup>144</sup> Furthermore, successful implantation also depends upon “a class of molecules known as integrins” which aid in binding the embryo to the endometrium.<sup>145</sup>

Pregnancy then, is not initiated by the embryo, but rather by the woman’s body, although successful implantation depends upon the highly coordinated interaction between the two. The body reacts to the new embryo not as it does to a hostile aggressor or infection; the immune system actually alters so the embryo will not be rejected. Finally, we should remember that coercion requires that one be forced to do something under threat of personal harm. But at no time is the mother’s body in jeopardy if the embryo is rejected. Just the opposite, any maternal resistance to the embryo would result not in harm to herself, but in harm to the embryo instead.

Finally, the embryo does not act upon its mother the way a parasite acts upon its host. If it truly robbed her of vital nutrients, the vast majority of women would emerge from childbirth needing to gain weight rather than lose it. In fact, all of the bodily changes that so horrify McDonagh are undertaken precisely in order for the woman’s body to accommodate both the baby’s needs and her own.

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144. Wilks, John, B. Pharm, MPS MACPP, “The Impact of the Pill on Implantation Factors – New Research Findings,” *La Treve de Dieu*, available from <http://www.trdd.org/ETHMEDE.HTM>; Internet; accessed July 29, 2003; pp. 1-2 of 11.

145. *Ibid.*, 6 of 11.

In a footnote, McDonagh concedes that “it is true that self-defense does not apply as a justification for the use of deadly force if the victim of aggression has provoked that aggression.” But she denies that this applies to pregnancy:

It is apparent that it is not that a woman provokes a fetus but that her body is attractive to a fetus, much as a woman might be sexually attractive to a man. Being attractive to a private party, however, does not give that party the right to intrude on one’s body, liberty or even property. Owning an attractive house, car, or personal items, for example, does not give private parties who are attracted to them the right to take them from you.<sup>146</sup>

But as we have seen, a woman’s body does not merely get in the way of fetal aggression, but takes an active role in ensuring the embryo’s successful implantation. The embryo is “attracted” to the woman’s body -- not as one walking down the street is attracted to a pretty house, but rather, as one walking down the street might enter a dwelling plastered prominently with signs reading “Open House.” Regardless of whether a woman consciously wishes to be pregnant, her body has already consented – and communicated with the embryo in the only fashion possible. A clear invitation has been issued. To deny this would be the equivalent of using sign language to invite a deaf person into your home, and to continuously offer that person meals and a bed, all the while loudly protesting from the next room that he is not welcome.

McDonagh says that even if a woman implied tacit consent to a pregnancy by not aborting immediately, consent must be ongoing throughout the pregnancy, so she retains the right to abort at any time. “A woman who seeks an abortion gives explicit notice that she does not consent to engage in a pregnancy relationship with a fetus. By

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146. McDonagh, n.75, p. 229.

seeking an abortion, she is actively expressing her explicit objection, not her implicit assent.”<sup>147</sup> Expressing her explicit objection to whom? Certainly not to the fetus, who is being actively nurtured by her body even as she walks into the abortion clinic.

Justifying abortion in this way is the same as “revoking” your consent to house the deaf person by pumping a bullet into him.

In the end, we must suppose that for McDonagh, as for so many feminist writers and perhaps modernity as a whole, the real fly in the ointment is not the tiny being in the womb but nature itself. The cry “I will not serve!” rings out once again as modern man (or woman) seeks out new grounds for the conquest of nature. To this end, McDonagh denies that pregnancy is a natural process:

The word *natural* refers to processes that occur without human intervention, like hurricanes, floods, fires, earthquakes, diseases and death. If a person becomes involved in these processes, they are no longer regarded as natural but, rather, as caused at least in part by human agency . . . therefore, it is precisely the claim of pro-life forces and others that the fetus must be considered to be a person that starkly contradicts any depiction of pregnancy as natural. To the extent that pregnancy is initiated and maintained by an entity that is a person, it is a product of human agency, not the product of forces of nature.<sup>148</sup>

It sounds as though McDonagh is saying that any process that involves human beings cannot be considered natural or that human beings are not subject to natural processes. But this contradicts her earlier statement that “it makes no sense . . . to say that people consent to the way in which their blood circulates or their eyes focus or that they consent to rain.” In this vein, she adds that “if the fertilized ovum were merely a physiological mass of cells, like a force of nature, the legal meaning of consent, defined

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147. Ibid., 68-69.

148. Ibid., 61.

as a concurrence of wills, would become an unnecessary and a meaningless concept.”<sup>149</sup> So it seems that we must either regard the embryo as a “physiological mass of cells” like a tumor (the old pro-choice argument, grown stale in the light of medical advances) or deny that pregnancy is natural, since it involves human beings. So *natural* refers to what occurs through the force of nature. *Human* can refer only to what occurs through an act of the will. Pregnancy is not “natural” to human beings only if one lives entirely within a dualistic worldview which supposes that the body exists only for the purpose of gratifying the *self*, from which it is substantially detached. But such flights of fancy are upended by reality at every turn, as pregnancy so aptly demonstrates. For the woman’s body does consent to the pregnancy, regardless of what she consciously wills.

Perhaps the fact that in an unwanted pregnancy a woman’s mind is in battle with her body renders the notion of consent moot, since McDonagh acknowledges that legally, “consent is an ‘act of reason,’ which must be a ‘voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another.”<sup>150</sup> A woman may not appreciate the fact that her body has accepted a pregnancy, but on these grounds she might just as logically claim that her liberty rights are violated by menstruation, growth, or aging.

But McDonagh is at least realistic enough to admit that abortion is no ordinary “medical” procedure, for she does not buy into the idea that the being occupying the womb is nothing more than a mass of cells. She says “Like it or not, the reality is that

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149. Ibid., 60.

150. Ibid., 60.



abortion kills human life, however one constructs its stage of development and whether or not human life is synonymous with personhood.”<sup>151</sup> But McDonagh’s justification for abortion relies entirely on the assumption that the life taken is also the life of a person. We have seen all the ways that the fetus cannot be construed as a hostile aggressor or an unwanted intruder. So would McDonagh then be ready then to admit that abortion kills persons without proper justification?

This is far from likely. McDonagh’s apparent willingness to concede personhood to the preborn human turns out to be a mere rhetorical trick, for throughout the book she reveals a thinly veiled contempt for this notion. She prefaces statements with the term, “*even if* the fetus were a person . . .”<sup>152</sup>; suggests “tolerating” the “possibility that the fetus is a person,”<sup>153</sup> and refers to preborn humans as “fetuses who may or may not yet be people,” or “potential life”<sup>154</sup> and to drive the point further home, “unborn potential life,”<sup>155</sup> and “preborn potential persons.”<sup>156</sup> In the end, she admits that although she has been “conceding the possibility that the fetus might be a person,” this idea is based mainly based on “religious precepts.”<sup>157</sup> So the fetus is a hostile intruder who must be stopped, and even if it isn’t, abortion, which admittedly takes human life, is a religious question that cannot be settled. Once again, the grounds for discussion have been conveniently swept out from under our feet. For modern

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151. Ibid., 189.

152. Ibid., 10, 38; emphasis added.

153. Ibid., 20.

154. Ibid., 37.

155. Ibid., 69.

156. Ibid., 171.

157. Ibid., 190.

philosophers, in stark contrast to St. Thomas, the failure of logic is the beginning of faith.

*The Right to Commit a Wrong?*

So Dworkin admits that abortion takes a human life, but since this life does not belong to a *person*, abortion is not morally wrong. McDonagh goes a step further, to argue that even though abortion does take the life of a person, it is still not morally wrong. In *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics*, Mark Graber goes so far as to admit that abortion is “morally wrong,” but that it should be permitted anyway. He proposes looking at abortion through the lens of “equal choice,” or equality under the law, promising to steer a pragmatic course between the typical pro-life and pro-choice claims, which are “universal claims. . . ultimately grounded on abstract concepts and not on concrete realities.”<sup>158</sup> He says:

The canonical works in the pro-choice, pro-life and anti-*Roe* traditions frequently treat as axiomatic philosophical assertions and theories of constitutional interpretation that most citizens question. . . The foundational values of pro-choice, pro-life, and anti-*Roe* positions all enjoy broad popular support and all are deeply rooted in the American political and constitutional tradition. Americans cannot reach a consensus on abortion policy because they cannot choose among those values when they conflict.<sup>159</sup>

Abortion is contentious, Graber suggests, because one’s opinion of it is formed by moral principles that are not relevant to the way abortion policy is carried out in the real world. Apparently setting aside any claims to universal moral principles, Graber

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158. Graber, Mark, *Rethinking Abortion: Equal Choice, the Constitution and Reproductive Politics* (Princeton: Princeton University Press, 1996), 36.

159. *Ibid.*, 37-38.

instead proposes to justify abortion based on the way abortion laws were enforced before *Roe v. Wade*, and what he says is likely to happen if the law ever again prohibits abortion. At first glance, Graber's argument appears to be based on the claim that despite its illegality, abortion before *Roe v. Wade* was nearly as widespread as it is today. He contends that legal prohibitions did very little to stop abortion:

By a series of admittedly speculative extrapolations from various population trends, Dr. Christopher Tietze estimates that 70 to 90 percent of all abortions performed after *Roe* merely replaced illegal abortions that previous pro-life measures on the books had not prevented. If these hypotheses are correct, then evidence that 1.5 to 1.6 million legal abortions are now performed annually in the United States supports estimates of at least one million illegal abortions each year during the 1950s and 1960s.<sup>160</sup>

“Recriminalizing abortion,” Graber says, “will not protect the unborn because pro-life laws on the books are nearly impossible to implement. Criminal measures succeed in practice only when the bulk of the community shares the sentiments embodied by the law. Because more Americans support abortion rights than in the past, localities that recriminalize abortion will experience even greater public pressure not to prosecute competent abortionists than we have seen historically.”<sup>161</sup> Putting aside the fact that records of abortions were not kept in the days before *Roe* and that therefore the actual number of illegal abortions performed is a matter of contention between pro-life and pro-choice groups (and probably far lower than one million), let us suppose that Tietze's “admittedly speculative” estimate is correct. One could still argue that legal abortion has contributed to the deaths of an additional 500-600,000 humans per year for

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160. Ibid., 66.

161. Ibid., 73.

over 30 years.<sup>162</sup> But in fact, the actual statistic is irrelevant, for Graber's argument does not really hinge on whether the number of abortions performed before *Roe* was greater than, fewer or the same as it is today.

For Graber, the real problem with abortion before *Roe* lies not so much in the actual number of illegal abortions performed, but in the fact that abortion law was not democratically enforced. For while affluent white women were usually able to abort their fetuses without legal interference, the same law enforcement community "often prevented competent abortionists from offering their services to the general public." Thus, in the enforcement of abortion laws the poor were discriminated against, making it harder for the poor to have abortions and more dangerous when they did so. "Such selective enforcement," says Graber, "places responsibility for policy making in the hands of unelected and often unaccountable police officers, prosecutors, judges, and juries."<sup>163</sup>

Graber says that abortion must remain legal under the principle of "equal choice," which he describes as follows:

No state may make abortion policies that discriminate against poor persons or persons of color. Policies that intentionally distribute rights on the basis of economic class or race violate a venerated principle of

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162. Arkes reports that Tietze had estimated that before *Roe* "there were about 600,000 illegal abortions every year, and many supporters of abortion argued that its 'legalization' would merely bring these operations into safer settings, without adding to the volume of abortions." In fact, by 1974 "the number of abortions had risen to 900,000 per year, 53 percent above their level in 1972, one year before *Roe v. Wade*. By 1977, the annual number of abortions had risen to 1.2 million, and by 1982 it was well over 1.5 million. Clearly, then, the laws were not merely accommodating the abortions that would have been performed illegally; the laws were also teaching new lessons about the propriety of abortion, and it should not have been surprising that the people who were taught to regard abortion as a legitimate medical procedure should be encouraged to make use of that operation when it seemed to suit their interest." *First Things*, p. 383.

163. Graber, 12.

Western civilization, *isonomia* or equality before the law . . . Hence, government officials may not constitutionally help establish or maintain an exclusive gray market that provides affluent white women with de facto immunities from statutory bans on abortion. When privileged women in a community are free to terminate their pregnancies without substantial medical and legal complications, all women must be accorded the same formal liberty.<sup>164</sup>

Graber's heavy reliance on statistics and sociological data obscures the fact that equal choice actually has nothing to do with whether large numbers of people were denied access to abortion pre-*Roe*. Interestingly, his clearest statement to this effect is buried in a footnote:

Pro-life advocates cannot parry equal choice attacks by noting that police officers and prosecutors failed to harass many physicians who performed abortions for the general public. Equal protection rights are violated whenever government officials privilege or harm *some* persons because of their race or socioeconomic status: victims of unconstitutional discrimination need not demonstrate that all or even most members of their class or caste have suffered disparate treatment. Warren McCleskey's constitutional rights would have been violated had he been the only victim of race discrimination in the history of Georgia.<sup>165</sup>

Graber's conjecture about the number of illegal abortions before *Roe* as a basis for "rethinking" abortion turns out to be a red herring, for abortion as an equal choice issue has absolutely nothing to do with this, nor with the number of illegal abortions that Graber says would ensue in the wake of new abortion bans. Even if abortion laws were strongly enforced in a particular state or the whole country, equal choice would still come into play. Wealthy people could afford to get an abortion elsewhere, or, thanks to their socioeconomic status, use their connections with those in the medical

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164. Ibid., 76.

165. Ibid., p. 196, n.1. The reference to Warren McCleskey regards *McCleskey v. Kemp*, which ruled that "persons making equal protection attacks on capital sentencing processes . . . had to 'prove that purposeful discrimination had a discriminatory impact on (them).'"p 92.

community to obtain an illegal abortion, just as wealthy or prominent people can use their connections to manipulate the system in any other way -- whether it involves obtaining illegal drugs, engaging in income tax evasion, or avoiding the legal consequences of driving under the influence of alcohol.

The principle of equal choice, says Graber, forbids the law to place anybody at a disadvantage due to their race, class, etc. If a practice puts even one member of a race or class at a disadvantage, equal choice has been violated. What can this mean other than that equal choice is a moral principle, and therefore does not depend for its validity on any type of utilitarian calculations or endorsement by dominant opinion? So although Graber set out to defend abortion by looking not to any abstract moral principle but to the actual practice of people in the real world, he ends up invoking a moral principle after all - the principle of equal choice, which he holds to be valid in its own right and not dependant on the number of people to which it applies. Indeed, Graber says:

Unlike pro-choice arguments, which rely heavily on controversial moral claims and interpretive theories, equal choice arguments follow naturally from political values and legal precepts that most Americans regard as axiomatic. Policies that grant affluent white women practical indulgences from the criminal law are inconsistent with widely held principles of justice as well as the plain, original, and historical meanings of the equal protection clause.<sup>166</sup>

While equal choice may flow naturally from axiomatic principles, it is far from clear that abortion rights flow naturally from equal choice. In the words of Hadley Arkes, “it requires a radical misunderstanding of the notion of ‘equality’ – or a critical

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166. Ibid., 118.

detachment of ‘equality’ from any substantive moral sense – to claim on behalf of the poor an ‘equal right to do a wrong.’<sup>167</sup> Indeed, one wonders why equal choice should apply so urgently to abortion, when, as noted above, and as Graber himself acknowledges, there are virtually scores of other areas of law enforcement where the rich have an unfair advantage over the poor. Graber says that “Pre-Roe abortion polices had a disparate impact on poor women and women of color because legal restrictions on reproductive choice were selectively enforced, and not because market societies normally distribute superior goods and services to more affluent citizens.”<sup>168</sup> But as we have seen, Graber’s case for equal choice is not really based on the effectiveness of law enforcement, since it logically entails that abortion be kept legal if even one person is denied an abortion due to socioeconomic status. And yet, Graber does not believe that having the “right” to commit a “wrong” should extend to other instances in which affluent people may get away with a crime:

The democratic relationships between equal justice and individual rights provide a vital distinction between pre-*Roe* abortion laws in action and other malenforced provisions in the penal code. Persons of color who commit felonies may be treated more severely than white felons by the legal system, but no one seriously maintains that homicide laws would be abolished if administered more evenhandedly. Affluent white Americans do not enjoy de facto immunities from the law against murder  
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167. Arkes, *First Things*, 382. Arkes also notes that in cases where “the rich have more devices for evading the law than people who are not so well off,” the typical response is not to repeal the law, but to enforce it more strenuously. “The intractable question, of course, is whether there is a principle that justifies the laws on the books. If there is, then the *validity* of that principle cannot be affected in any way by showing that the laws are being widely disobeyed ... the flouting of the law cannot itself provide a moral justification for repealing the statute and pretending that the wrong we once condemned has ceased to be a wrong.”

168. Graber, 86.

169. *Ibid.*, 105.

So although nobody claims we should remove bans on homicide simply because the law is often broken or is sometimes administered unfairly, this is not the case with abortion, for “communities must make special efforts to prevent legal inequalities that differ in kind or in degree from the inequalities that inevitably plague the administration of most laws. Even if no society can eliminate all discriminatory law enforcement practices, communities should remedy every equal protection wrong that violates other constitutional norms.”<sup>170</sup> If equal choice is to apply primarily to practices that “violate other constitutional norms,” one is left wondering why it should apply so fundamentally to abortion, which in taking life, is itself in conflict with a constitutional norm.

Graber admits to believing that abortion is a “moral wrong,” and that “the number of abortions performed annually is indeed scandalous.”<sup>171</sup> For the reasons noted earlier in this chapter, there would be nothing “morally wrong” or “scandalous” about abortion if it did not involve the taking of human life. But despite his self-professed moral reservations to abortion, Graber concedes that he is really pro-choice because, if ever confronted with an unwanted pregnancy in the family, he would probably choose abortion.<sup>172</sup> Graber is entitled to his own opinion, but he also asserts, outrageously, that very few self-identified pro-lifers would remain so when confronted with an unwanted pregnancy. He says that “Significantly, pro-life women are as likely as other women to choose abortion when faced with an unwanted pregnancy. One study found that more than two-thirds of all women obtaining abortions were not clearly

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170. Ibid., 105.

171. Ibid., 159-60.

172. Ibid., 159-60.



pro-choice prior to that experience. Some of these women thought abortion was justified in a few circumstances, but their abortions often did not satisfy those conditions.”<sup>173</sup> Setting aside the dubious fact that in order to declare what the opinions of pro-life women “are” Graber cites sources that date mostly from sixteen to twenty years before the publication of his book,<sup>174</sup> one cannot rely on data from self-labeled “pro-life” women seeking abortions to make inferences about actual pro-life women who might have had an unexpected pregnancy, but would not be in an abortion clinic to respond to such a survey in the first place.

Actually, it would be more logically consistent for Graber to avoid professing any hesitations about the morality of abortion, given the fact that doing so undermines his case for equal choice. For in labeling abortion a “moral wrong” but admitting he would procure one for his own daughter if necessary, how can he then profess to uphold any other moral principles he might have, including that of equal choice? How is this any different from claiming to be opposed to homicide, yet being admittedly unsure about whether one would kill a spouse caught in the act of adultery? Indeed, what difference does it make if equal choice flows from “axiomatic” principles if people cannot ever be trusted to remain true to their own deeply held convictions? To claim that nobody would remain morally opposed to abortion when affected personally is to deny the very possibility of fundamental moral principles at all.

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173. Ibid., 100.

174. The surveys Graber cites as evidence date back mostly to 1977, 1978, and 1980, with one reference to a source from 1984. Later he cites the same survey to support his claim that “one should not underestimate the power of hypocrisy or denial in American politics, particularly in light of evidence that man citizens firmly (and erroneously) believe that they would not seek an abortion or so counsel a loved one when faced with an unwanted pregnancy.”(p. 147).

But this is not to deny the difficult moral dilemma faced by someone who is unexpectedly pregnant and who might indeed be tempted to disregard principles previously held as true. But this is exactly why we need laws in the first place. Arkes explains:

We have laws precisely because we cannot leave the vindication or avoidance of wrongs to the commands of self-interest. When our obligations collide with our ‘interests,’ even men and women with the best of intentions may need an additional support to firm them up in their strength to choose what is right and avoid what is wrong . . . When the law proscribed abortion, it was informed by an understanding far more impressive than that which most . . . could summon for themselves . . . It enveloped the event . . . with an understanding that signaled its portentousness to anyone who might be tempted to resort to abortion for the most casual or thoughtless reasons. To the extent that the law discouraged young people from taking life for reasons that were casual and self-serving, it saved them from an experience that would enduringly haunt the thoughtful. For those who would never suffer the strains of serious reflection, the law spared them from the arrogance of believing that their own, untutored reflexes on a matter like abortion were as good – and as worthy of respect – as any other reflection that had been produced on the subject.<sup>175</sup>

In the end, we might say that *of course* Professor Graber isn’t certain how he would react to an unwanted pregnancy in the family – for despite his apparent understanding of abortion as a “moral wrong,” he has shown, throughout the book, a remarkable obtuseness to the fact that abortion, in contrast with any other issue that might fall under equal choice, involves taking a life that is incontestably human. For example, in making his case for equal choice he compares laws against abortion with a hypothetical law that denies certain medical treatments to the elderly, but is not strictly enforced, thus allowing the evolution of “an exclusive gray market in geriatric

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175. Ibid., 416.

medicine.” Despite the fact that one gray market has the effect of preserving life and the other has the effect of taking it, Graber insists that there is no “relevant difference” between the two that would “justify condemning the former but not the latter.”<sup>176</sup>

He says that “state policies that cause substantial race and class disparities without serving any legitimate social purpose normally violate the equal protection clause.”<sup>177</sup> Is the protection of life not a legitimate social purpose? He also says that a “generous people committed to the spirit as well as the letter of constitutional equality would fund abortions for indigent women”<sup>178</sup> To this one might reply that a more “generous” response would be to support the protection of the weakest and most vulnerable members of the human race and their mothers as well.

Finally, in imagining a pro-choice “utopia” ruled by the principle of abortion as a “fundamental human right,” Graber suggests that the pro-life movement would be “discussed in the same way as *Dred Scott v. Sanford* and the pro-slavery movement. The school curriculum ensures that the next generation of voters is no more able to desire a United States without abortion rights than a United States with slavery.”<sup>179</sup> He also compares pro-choice strategists to Union commanders in the Civil War.<sup>180</sup> Considering his own self-professed belief of abortion as a “moral wrong” one would think Graber might shy away from trying to compare pro-choice thinking with the abolition of slavery, given that the validity of both abortion and slavery alike rests on

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176. Ibid., 15.

177. Ibid., 78.

178. Ibid., 79.

179. Ibid., 134-35.

180. Ibid., 142.

the assumption that certain classes of human beings are not worthy of the full protection of law. And although Graber claims to be “agnostic” on the question of whether abortion is a fundamental right, the fact that he devotes an entire section of the book to devising tactics for keeping abortion legal confirms that he is nothing if not pro-choice.

Arkes has noted that “the flouting of the law cannot itself provide a moral justification for repealing a statute and pretending that the wrong we once condemned has ceased to be a wrong.”<sup>181</sup> We have seen that Graber’s justification of abortion does rely on invoking a moral principle – that of equal choice. Graber began from the position that abortion, while morally wrong, will occur even if it is illegal. Since this violates equal choice, abortion must be sanctioned by law. But we cannot logically invoke one moral principle (equality under the law) to justify violating another (the protection of life).

Human beings cannot avoid thinking and speaking in moral terms. Perhaps it is but a short step from stipulating that the law must condone what is morally wrong to embracing that act as a moral good. Indeed, in the end we are indeed left wondering if the real “moral” principle Professor Graber upholds is not equal choice, but abortion itself. For in an almost Machiavellian flourish of irony, Graber summons the very forces that he says caused discrimination in abortion laws in the first place to keep abortion legal. Although the chief problem with pre-*Roe* abortion law supposedly lay

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181. Arkes, *First Things*, 382. Also see *Veritatis Splendor*, where John Paul II argues the same point from a different angle: “It is quite human for the sinner to acknowledge his weakness and to ask mercy for his failings; what is unacceptable is the attitude of one who makes his own weakness the criterion of the truth about the good, so that he can feel self-justified, without even the need to have recourse to God and his mercy.” (P. 126)

in the fact that access was limited for poor people, Graber repeatedly admits that the affluent are far more likely than the poor to support abortion on demand.<sup>182</sup> And in fact, Graber advises, abortion will remain legal not by appealing to a rainbow coalition of the poor and disadvantaged, but rather by relying on “elites:”

Given their strong support among economic, educational, and political elites, proponents of legal abortion should never suffer electoral defeat. Persons of high socioeconomic status have, on average, greater influence in the selection of candidates and in policy making than other Americans. Affluent Americans control politically valuable resources, they participate in politics more frequently and efficaciously than their fellow citizens, and they even vote more often than less fortunate citizens. Hence, when leading citizens are fairly united on a matter that sharply divides the rest of the populace, elite values should consistently be converted into the law of the land. The modern tradition of nominating only prestigious lawyers to the Supreme Court provides pro-choice forces with another substantial political advantage. Should policy-making responsibility for abortion devolve on a judiciary chosen without an abortion litmus test, the justices will almost certainly favor the liberal reproductive policies that elites prefer. . . Obsessed with mobilizing the dispossessed, many of whom are pro-life, proponents of legal abortion have not recognized that their fundamental strategic problem is getting affluent Americans who support reproductive choice to convert those policy preferences into political actions.<sup>183</sup>

Of course, all of this is entirely at odds with the flavor of the first half of the book, which is centered on the theme that the poor are unfairly disadvantaged when it comes to getting abortions. In the end, that all seems to be beside the point, for here Graber admits that the wealthy are far more likely to be in favor of abortion than are the poor. Perhaps it is not what the poor want, but what “elites” like Professor Graber think they need, that must carry the day. For although he has criticized past abortion laws on the grounds that they were undemocratic, he has no problem with calling on a band of

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182. See Graber, pp. 133, 136, 142, 144, 145.

183. Ibid., 145-46.

nabobs, plutocrats and assorted intelligentsia, who compose a distinct minority of Americans, to protect a “right” he says most poor people do not want anyway:

To enlist the elite support necessary to keep abortion legal, equal choice advocates ought to take political steps that remove reproductive issues from the political agenda . . . removing abortion from electoral politics will keep abortion legal.<sup>184</sup>

With this in mind, Graber finds comfort in the fact that most Supreme Court justices are drawn from the “elite” pool of Americans, and in the reluctance of most politicians to change abortion policy. This means that abortion will remain legal, provided that strong pro-life candidates and justices are kept from holding offices. Thus, “proponents of legal abortion should concentrate their political energies on defeating strongly pro-life officials,” for “the difference between what a committed pro-life and an indifferent politician will accomplish in the near future is much greater than the corresponding difference between a committed pro-choice and an indifferent politician.”<sup>185</sup> He says:

Keeping abortion off the political agenda is a way to realize the pro-choice demand that abortion rights “should depend on the outcome of no elections.” Too often, unfortunately, that expression is used as a pious slogan rather than as a blueprint for political action. Ritual chants that fundamental rights should not depend on a majoritarian decision do not make that so. Legal abortion will indeed be best secured when reproductive choice depends on the outcome of no election.

Nevertheless, much hard political work remains to be done and tough political choices have to be made for abortion policies to regain their immunity to shifts in American partisan politics.<sup>186</sup>

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184. Ibid., 147.

185. Ibid. 149-50.

186. Ibid., 155-56.

Graber concludes that “American abortion policies teach the valuable lesson that the ignorance and hypocrisy of the majority pose as great a threat as the more-often attacked tyranny of the majority to a just democratic order.”<sup>187</sup> So abortion is a fundamental right that must be protected from the hoards of unenlightened pro-life citizens who might vote for politicians that would try to overturn *Roe*. In the end, Graber’s project has not really been about rethinking the meaning of abortion; it is rather an act of pouring old wine into a new bottle – it is not so much a clarion call for equality under the law as a clever attempt to justify abortion anew by someone who is at least intellectually honest enough to admit that the current pro-choice arguments “having little specific foundation in the plain, original, or historical meanings of the Fourteenth Amendment, must rely on very controversial theories of constitutional interpretation.”<sup>188</sup>

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187. Ibid., 160.

188. Ibid., 11.

## Conclusion

*This thing which I have called for convenience the “Tao” and which others may call Natural Law or Traditional Morality or the First Principles of Practical Reason or the First Platitudes, is not one among a series of possible systems of value. It is the sole source of all value judgments. If it is rejected, all value is rejected. If any value is retained, it is retained. The effort to refute it and raise a new system of value in its place is self-contradictory. There never has been, and never will be, a radically new judgement of value in the history of the world. What purport to be new systems or (as they now call them) ‘ideologies,’ all consist of fragments from the “Tao” itself, arbitrarily wrenched from their context in the whole and then swollen to madness in their isolation, yet still owing to the “Tao” and to it alone such validity as they possess.*  
C.S. Lewis, “The Abolition of Man”

*Political atheism is a falsehood, and no falsehood can live. Its triumph can be but temporary, and last no longer than the heated passions which have given it birth.*

– Orestes A. Brownson, “The American Republic”

*In the end, only a morality which acknowledges certain norms as valid always and for everyone, with no exception, can guarantee the ethical foundation of social coexistence, both on the national and international levels.*

John Paul II, “Veritatis Splendor”

The terminology of natural and human rights springs from a philosophy that is, in the final analysis, inimical to the universal human dignity that such rights are meant to protect. Nevertheless, it seems very clear that rights discourse, like love in the old Gershwin tune, is here to stay. Regardless of the various ways in which they are articulated or defended, human rights are meant to express the inviolable moral worth of the individual. We must recognize that there is simply no logically consistent way to



defend such a concept apart from natural law. But to acknowledge that natural law is an essential component of moral argument is no small concession -- for it is to admit that the universe is ordered, and that this makes a difference to the conduct of human life.

When we view human rights from the standpoint of a natural order ruled by the principle that good must be done and evil avoided, we may realize that the rights that are actually *universal*, that is, the rights that are properly understood as *human* rights, are far fewer than those enumerated in the Universal Declaration of Human Rights. In fact, from what we learned from St. Thomas, we might say that the only universal rights are to life and liberty, if we think of these rights in the following way: Life is the most fundamental right. It is not only the basis of every other good, it also, by its very nature, delineates the limits of man's freedom -- for however much we may like to think of ourselves as autonomous, and however far we may think we can carry out our conquest of nature, the one thing we cannot have ultimate control over is life itself. Nobody can choose not to be born, nobody can choose not to die. Life is the limit to our autonomy. Thus, it makes no sense to hold autonomy as a higher value than life.

If life sets the boundaries of freedom in the natural realm, then it should do so in the realm of human rights as well. Liberty is a fundamental human right if by liberty we do not necessarily mean every freedom that is enjoyed in Western society, but rather, the freedom to fulfill our ends as human beings; that is, freedom in the service of life. We described this earlier as the right to lead an authentically human life, which meant essentially the right to be virtuous.

If we were to codify this value into a specific right, perhaps it would take the form of freedom of conscience, for we cannot really be virtuous unless we can choose the good freely. But what specific human right would embody freedom of conscience? This is harder to define, and beyond the scope of this dissertation. At a minimum, it would seem that nobody may be deprived of their *ability* to act according to moral principles. Torture would thus be a violation of human rights since, even more important than causing bodily injury, it renders one incapable of free will. Also, we would have to suppose that this human right would mean that the state cannot force someone to act in violation of their conscience, especially if such an action would be in violation of any fundamental moral principles. If we were to articulate the principle of freedom of conscience further, we might view it as encompassing religious liberty – because for most people, the religious community is an important means of developing the conscience. Furthermore, as noted in Chapter 4, the family should be recognized as the fundamental embodiment of these two essential human rights; for it is through the family, in its role as the cradle of life and the seedbed of virtue, that the human being receives his beginning, and is directed toward his end.

We noted in the last chapter that as basic as the protection of life might seem, to uphold life as an absolute value would effect a radical change in the direction that human rights law is currently heading. It would be to deny that abortion, suicide or euthanasia are fundamental human rights. It would also raise serious questions regarding the permissibility of capital punishment in the modern world.

In the end, the task of ensuring human rights - that is, achieving respect for those rights which are actually universal -- may rely less on what can be enforced, which is notoriously difficult to do on the international level, and more on education. That is to say, the achievement of both the greater and lesser goals of human rights is ultimately dependent on the existence of a culture built on the understanding, not of what human rights are, but more importantly, what they are *not*. Contemporary universalists think that if only the world were entirely democratic, justice and peace would reign. But without a commitment to preserve the most basic rights, can we really expect much progress in achieving anything else?

The only real alternative to truth is nihilism. Apart from natural law neither liberalism nor any other philosophy can remain true to its most basic principles. It is only through adherence to natural law that liberalism's important regard for the individual is truly respected. In the words of John Paul II:

(Moral) norms in fact represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, and hence of genuine democracy, which can come into being and develop only on the basis of the equality of all its members, who possess common rights and duties. *When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone.* It makes no difference whether one is the master of the world or the "poorest of the poor" on the face of the earth. Before the demands of morality we are all absolutely equal.<sup>1</sup>

Rights discourse may be the respiration of the democratic body politic, but natural law is the oxygen. Political philosophy can no more do without it than the lungs can do without air. We may stubbornly insist that we can breathe in its absence,

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1 John Paul II, *Veritatis Splendor* (Boston: Pauline Books & Media, 1993), p. 96.

employing various postures and techniques in the hope of maximizing our effectiveness in this regard, but we will soon find ourselves blue faced and panting on the floor, reeling from the effects of our own self-induced asphyxiation. In the end, we must choose to acquiesce to the demands of nature and open ourselves to that for which our rights exist in the first place, lest we, in our “freedom,” suffocate to death.

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