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Looking For Bedrock: Accounting for Human Rights in Classical Liberalism, Modern Secularism, and the Christian Tradition

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“Without . . . a justification, the appeal to [human] rights is quite mysterious.”¹

“[W]hat faith seeks and sometimes finds is insight into a true humanism—into the meaning of human dignity.”²

The concept of human rights can be traced back for a few centuries or even several millennia, depending on one’s understanding of the historical record.³ Discussion of individual rights can be found in the writers of late medieval times.⁴ As Western Europe moved into the early modern period, an additional and somewhat broader emphasis on rights can be found among the political theorists of the Protestant Reformation, particularly in the Reformed tradition.⁵ Later yet, a rights-based approach became central to several strands of Enlightenment understanding of political order.⁶ The American Declaration of

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1. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 100 (2000).

2. GILBERT MEILAENDER, *NEITHER BEAST NOR GOD: THE DIGNITY OF THE HUMAN PERSON* 5 (2009).

3. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625* 316 (1997) (“The idea of natural rights grew up among Catholic jurists and theologians during the medieval era.”).

4. See *infra* text accompanying notes 11–12.

5. See *infra* text accompanying notes 20–23.

6. See *infra* text accompanying notes 27–39; see also RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 177 (1979) (“It is remarkable how

Independence, for example, describes the trilogy of life, liberty, and pursuit of happiness in terms of “unalienable”—human—result rights.⁷ Since the end of World War II, there has been an explosion of the number of rights identified as distinctively “human.”⁸ What presuppositions underlay the historical configurations of the foundation and extent of human rights? And what accounts exist for current formulations of human rights?

Contemporary developments in the concept of human rights have seen several iterations. Consensus on new human rights has become increasingly difficult, and implementation of successive generations of human rights instruments has proved increasingly trying. This Article asserts that a reason for these progressively more intractable challenges results from the failure to grapple with the very grounding of human rights. Human rights theories abstracted from real human beings with their thick historical, moral, and theological conceptions of life are insufficient. The more abstract the ground for human rights, the less traction it has for concrete individuals. Harmony on a single account for human rights is not feasible in this pluralistic age but candid discussion of the competing presuppositions—including those arising within religious traditions—can prove helpful. This Article presents one such account in terms of the Christian doctrines of the creation of human beings in the image of God and the divine delegation to humans of authority to rectify wrongs.

Before developing this account, Part I of this Article looks to the history of foundations of human rights from late pre-modern times to the late-eighteenth century Founding era in America. The focus of the discussion of this era will be on two dominant strands of rights talk in America, Protestant Christian and Enlightenment. From two views operating side-by-side in the last decades of the eighteenth century, Part II will examine the contemporary ambivalence of many Christians, particularly those identified as Evangelicals, about the contemporary human rights movement. Part III addresses a specifically Christian foundation for human rights that can dispel some of the concerns of

brief the two great *flourits* of rights theories were: the first c. 1350–1450, the second c. 1590–1670.”).

7. See CHARLES TAYLOR, *A SECULAR AGE* 392 (2007) (“[T]he picture of order invoked in the American Declaration of Independence, which foregrounds the notion of inalienable rights, was originally placed within a version of . . . ‘Providential Deism.’ Human beings were ‘endowed by their Creator’ with these rights.”).

8. See, e.g., INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, Treaty Status, Dec. 16, 1966, 993 U.N.T.S. IV-3 (2010); INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Treaty Status, Dec. 16, 1966, 999 U.N.T.S. IV-4 (2010).

Evangelicals about human rights. This Article will go on to contrast this foundation with a leading current non-theistic alternative. The proffered understanding of the divine delegation of the authority to implement civil justice is less well entrenched in Christian thought. Nonetheless, it provides an account for the legitimacy of state action from within the Christian tradition. This Article will conclude with some thoughts about the benefits of bringing this specifically religious perspective to bear on the topic of human rights.

I.

Legal emphasis on subjective rights—positive claims against others that can be vindicated through legal means as well as zones of immunity from the power of civil government⁹—has been traced to earlier and still earlier stages in the Western tradition. Some identify the Enlightenment as the historical milieu for rights-oriented thinking about social and political life.¹⁰ Other scholars such as Richard Tuck¹¹ and Brian Tierney¹² have documented the appearance of rights-oriented thinking in late medieval nominalism and thence to Roman civil law.¹³ More recently, Nicholas Wolterstorff has argued that the notion of rights underlay even the pre-common era Hebraic approach to law.¹⁴ Whatever may be the historical source of the legal concept of subjective rights, it is clear that

9. See generally Wesley Hohfeld, *Fundamental Legal Conception as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

10. See, e.g., JAMES GRIFFIN, ON HUMAN RIGHTS 9–14 (2008).

11. RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 13 (1979) (“It was among the men who rediscovered the Digest and created the medieval science of Roman law in the twelfth century that we must look to find the first modern rights theory . . .”).

12. BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625 43 (1997) (“I want to suggest that the humanistic jurisprudence of the twelfth century, especially the writings of the medieval Decretists, may provide a better starting point for investigating the origins of natural rights theories . . .”).

13. See JOHN WITTE, GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 33–35 (2006) (“The classical Roman jurists of the first centuries C.E. used the ancient Latin term *ius* to identify right in both its objective and subjective senses. . . . The classical Roman law also referred to subjective rights using the Latin term *libertas*, which roughly translates as liberty.”).

14. NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 167 (2008) (“[I]nherent rights were assumed and recognized by the writers of the Hebrew and Christian Scriptures.”).

by the late eighteenth century they occupied a central place in legal and political thought in America.¹⁵

Charles Taylor describes two dominant presuppositions underlying conceptions of the moral order in pre-modern Western Europe. The first, particularly strong in English thought, was “based on the idea of the Law of a people, which [had] governed this people since time out of mind.”¹⁶ At some time in the primordial past a “people” had been constituted. This original and ancient constitution assigned various rights to rules and subjects, which subsequent historical events may have modified, but against which all subsequent political and governmental actions could be measured.¹⁷ An alternative understanding of the fundamental moral order was “organized around a notion of hierarchy in society which expressed and corresponded to a hierarchy in the cosmos.”¹⁸ Tuck and Tierney have demonstrated that both pre-modern conceptions of the moral order were hospitable to the notion of individual rights.¹⁹

Transitioning from the pre-modern to the early modern era, broadly distributed and legally enforceable rights also found substantial grounding in the post-Reformation Protestant tradition.²⁰ Writers in the Reformed tradition did not reject the earlier views of the moral order. Nevertheless, for these writers, the foundation for rights was directly from the Divine. God had imposed certain duties on all human beings, which logically entailed a right to perform them:

The Reformers cast the person’s duties toward God as a set of rights that others could not obstruct—the right to religious exercise: the right to honor God and God’s name, the right to rest and worship on one’s

15. The Declaration’s trilogy of life, liberty, and the pursuit of happiness should be classified as human rights; see MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 187 (1994) (“In 1688-89 the most Whiggish of the Whigs were Grotians; by 1750 or so, they were Lockeans.”).

16. TAYLOR, *supra* note 7, at 163.

17. See DAVID OGG, *Introduction to IOANNOS SELDENI, AD FLETAM DISSERTATIO* li -lvii (David Ogg ed., 1925) (1647).

18. *Id.* For a classic discussion of the latter approach see ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1936).

19. See *supra* text accompanying notes 11-12.

20. See generally JOHN WITTE, *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007); see also TIERNEY, *supra* note 12. For an opposing argument from ignorance see JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 42 (2d ed. 2003) (“We might in principle imagine rights-based moral theories, but in practice such a category has historically been largely an empty one.”)

Sabbath, the right to be free from false gods and false oaths. They cast a person's duties towards a neighbor, in turn, as the neighbor's right to have that duty discharged.²¹

Rights in the Protestant tradition were the converse of biblically mandated duties. Most of the magisterial and later scholastic Protestant theologians looked to the Decalogue for a précis of such duties.²² A few, following rabbinic tradition, looked to the Noahic covenant.²³ The Reformed rights-as-obverse-of-duties approach was not understood narrowly. Indeed, it was consistent with a notion of personal liberty.²⁴ As the drafters of the Westminster Confession of Faith put it in 1647, "God alone is Lord of the conscience, and has left it free from the doctrines and commandments of men, which are, in any thing, contrary to His Word; or beside it, if matters of faith, or worship."²⁵ A robust understanding of Christian liberty pervaded Reformed political expressions.²⁶

Any pervasively historical, metaphysical, or theological foundation for rights was gradually eclipsed with the developing secular outlook of the seventeenth and eighteenth centuries. There was a shift in understanding of the foundation of the moral order, at least as it applied to political society.²⁷ No longer did elites focus primarily on ancient

21. WITTE, *supra* note 20, at 29; For evidence that the concept of duty-grounded rights remained persuasive in England in the late seventeenth century, see the comments about John Locke in Joshua Foa Dienstag, *Serving God and Mammon: The Lockean Sympathy in Early American Political Thought*, 90 AM. POLIT. SCI. REV. 497, 503 (1996) ("One does not seek freedom from absolute government in order to pursue one's wants but to fulfill one's duties.").

22. *Id.* at 333 ("Within a generation after Calvin, his followers had flipped these Decalogue duties in Decalogue-based rights.").

23. See JAMES R. JACOB, HENRY STUBBE: RADICAL PROTESTANTISM AND THE EARLY ENLIGHTENMENT 134 (1983) (Selden's scholarship was chiefly responsible for supplying Stubbe with his model for natural religion, the precepts of Noah . . ."); see also *infra* text accompanying notes 129–33.

24. See WITTE, *supra* note 20, at 122–34 (discussing Theodore Beza's expansion of rights, particularly the right of resistance, from John Calvin); *id.* at 176–96 (discussing greater expansion and specification of rights by Johannes Althusius).

25. WESTMINSTER CONFESION OF FAITH, *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 6 (New York, Harper & Bros. 1877) (1647).

26. Indeed, as Brian Tierney observes, "[f]rom the twelfth century onward, it was commonly held that natural law did not only command and forbid, but also left to humans a wide range of discretionary behavior where they were free to choose their own courses of action and had a right to act as they chose." Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After*, 3 AVE MARIA L. REV. 23, 37–38 (2005).

27. See generally TAYLOR, *supra* note 7, at 192.

charters, metaphysical hierarchies, or even divinely imposed duties. With the rise of what Charles Taylor labels Providential Deism,²⁸ God's place moved from within the political ordering of society to its benign architect and eschatological motivator:

What remained for God after the "Deist" fourfold eclipse? Still something significant. God remains the Creator, and hence our benefactor, to whom we owe gratitude beyond all measure. We are grateful for his Providence, which has designed our good; but this Providence remains exclusively general: Particular providences and miracles are out. . . . And he has prepared for us an afterlife, with rewards and punishments. This, too, is for our good, because it is what motivates us to fulfill his beneficent plan.²⁹

A sense of God's immanence faded although belief in his transcendence persisted.

Thus, at the time of the Founding, God remained important to American Enlightenment-oriented statecraft as the primary source of fundamental rights and as the architect of the pattern for a mutually beneficial society.³⁰ The substantive content of civil and political rights in Founding-era America was a *mélange* drawn from the ancient rights of Englishmen and the deliverances of reason. During this period "the central moral concern becomes the imposition of a disciplined order on personal and social life, ensuring high standards of self-control and good behaviour in the individual, and peace, order and prosperity in society."³¹ Understanding the social order in terms of an invisible hand characterized the Enlightenment approach.³² While God bookended the

28. See *id.* at 221–24 (describing the "anthropocentric shift" from traditional Christian orthodoxy to Providential Deism in term of a series of eclipses of longstanding beliefs in which: humans owe God nothing more than to carry out his plan to achieve their good; humans do not need God's grace to carry out this plan; there is no mystery in the design of nature; and God is not planning to transform human beings in a radical way (at least in this life)).

29. *Id.* at 233.

30. *Id.* at 225–26 ("Religion is reduced to moralism [which] in turn was cast in terms of the modern notion of order, one in which our purposes mesh to our mutual benefit.").

31. *Id.* at 260–61.

32. See CHARLES L. GRISWOLD, ADAM SMITH AND THE VIRTUES OF ENLIGHTENMENT 8 (1999) ("*The Wealth of Nations* clearly influenced thinkers in the American Founding . . ."). The invisible hand was an economic one. See also TAYLOR, *supra* note 7, at 229 ("The spreading doctrines of the harmony of interests reflect the shift in the idea of natural order . . . in which the economic dimension takes on greater and greater importance, and the 'economic' (that is, ordered, peaceful, productive) activity is more and more the model for human behavior.")). The growing importance of economic

social order, the divine played little role in the realization of a mutually beneficial society; the latter was principally a human product.

Early Protestant theologians would have concurred with the Lockean trilogy of rights—life, liberty, and property³³—but would have ordered them to glorify God rather than to maximize human flourishing.³⁴ Jefferson's substitution of the pursuit of happiness was a politic choice. It could be read by those in the historic Protestant tradition as shorthand for the believer's opportunity to enjoy God's blessings on earth³⁵ as well as an ultimate glorious union with God.³⁶ Yet, its allusion to the pursuit of virtue satisfied those with a more secular perspective.³⁷

harmony can be observed in the transition from the Articles of Confederation to the Constitution.

33. See, e.g., *THE LARGER CATECHISM: AGREED UPON BY THE ASSEMBLY OF DIVINES AT WESTMINSTER* (Dodd & Rumsey 1912) (1648); Questions and Answers 135 and 136 (nesting right of self-defense in series of duties under the rubric of the sixth commandment); Questions and Answers 141 and 142 (placing rights to engage in a "lawful calling," to expect good faith in performance of contracts, and to receive restitution in series of duties under the rubric of the eighth commandment); *WESTMINSTER CONFESSION OF FAITH*, *supra* note 25, at 660, Chapter 26.3 (recognizing right to property).

34. See, e.g., *WESTMINSTER CONFESSION OF FAITH*, reprinted in 3 PHILIP SCHAFF, *THE CREEDS OF CHRISTENDOM* *supra* note 25, at 652, Chapter 23.1 (stating that "God, the supreme Lord and King of all the world, has ordained civil magistrates, to be, under Him, over the people, for His own glory, and the public good . . ."); see also TAYLOR, *supra* note 7, at 221. Writing a nearly a century later but reflecting the Old School Presbyterianism of the Founding Era, Charles Hodge of Princeton Seminary expressed the subordinate place of human flourishing in the divine economy: "It is unscriptural and contrary to our moral reason to make happiness the end of creation. The Bible declares the Glory of God, an infinitely higher end, to be the final cause for which all things exist." CHARLES HODGE, *1 SYSTEMATIC THEOLOGY* 433 (1873).

35. See WITTE, *supra* note 20, at 92–93 (discussing Theodore Beza's belief that it was the duty of the magistrate to ensure the subjects' right to happiness).

36. See, e.g., *WESTMINSTER SHORTER CATECHISM*, reprinted in 3 PHILIP SCHAFF, *THE CREEDS OF CHRISTENDOM*, *supra* note 25 at 676, Question and Answer 1: "What is the chief end of man? Man's chief end is to glorify God, and to enjoy him forever."

37. See JAN LEWIS, *THE PURSUIT OF HAPPINESS: FAMILY AND VALUES IN JEFFERSON'S VIRGINIA* xiii (1983):

No one knows what precisely Jefferson had in mind when he asserted "the pursuit of happiness" as one of mankind's unalienable rights. . . . No member of the Virginia gentry would discount the importance, economic or political, of property, but Jefferson seemed to be moving from a cold acceptance of self-interest to a more hopeful notion of social felicity, a secular substitution for the eternal reward.

The need to reduce high-level principles to rules of action presented a challenge for those in the developing Enlightenment tradition. If the purpose of the human political vocation was to identify God's pattern for human flourishing and to develop a social ordering that would enhance it, how were the contents of this order to be discovered? As history, metaphysics, and religion slid into the background, two other resources came to fore. On one hand, "[t]his [new political] order was thought to be evident in the nature of things. . . . [R]eason alone can tell us God's purposes."³⁸ Reason apart from the redeeming work of Christ and the sanctifying work of the Holy Spirit was deemed sufficient. The relationship of God to the interstices of human life was reduced and reason's place, evidently without the need for divine reorientation, increased. On the other hand, certain strands of Enlightenment thought asserted that the rights required for this new order could be identified by looking within, by examining interior moral sentiments.³⁹ Notwithstanding their differing resources and differing accounts for the political order, the overlapping concerns of Protestant Christianity and Enlightenment political thought provided ample common ground during the Founding period and beyond.

The traditional Protestant understanding of a society ordered toward the glory of God retained a place during the Founding era⁴⁰ and "lived on among various Enlightenment Liberal and Civic Republican schools of American political thought in the later eighteenth and nineteenth centuries."⁴¹ Appeals to the older "ancient constitution" found

38. TAYLOR, *supra* note 7, at 166; see also MARTIN E. MARTY, *The Virginia Statute Two Hundred Years Later*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES* 13 (Merrill D. Peterson & Robert C. Vaughn eds., 1988) ("Religion, in the Virginia Statute [for Religious Freedom], is chiefly a cognitive or intellectual, not a behavioral or existential, matter.").

39. See *id.* at 258 ("[W]e can have an influential ethical theory in the eighteenth century centering on 'moral sentiments' . . ."). See, e.g., DAVID HUME, *A TREATISE OF HUMAN NATURE* (Dover Publications 2003 (1739–1740)); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (Knud Haakonssen, ed., 2002) (1759).

40. See WITTE, *supra* note 20, at 318 ("Many of the basic constitutional ideas and institutions developed by the Puritans in the seventeenth century remained in place in the eighteenth century. These ideas and institutions were advocated and adopted not only in their original forms by Puritan sermonizers and political conservatives, but also in vestigial forms by those who had claimed no adherence to Puritan beliefs.").

41. *Id.*; see also Dienstag, *supra* note 21, at 500 ("Locke links his social contract model to an ascetic Christian (rather than civic humanistic) account of virtue, and it is this link that attracts the founders.").

resonance in the Declaration of Independence.⁴² Nonetheless, even while God's existence and concern for human flourishing continued to ground human rights in Enlightenment thought, the orientation toward flourishing defined in terms of a mutually beneficial society and identification of rights by examining moral sentiments opened the door for contemporary utilitarianism and intuitionism. As belief in the bracketing of God's architectonic and eschatological functions eventually waned, divergence between what are today's Evangelicals and the more secularized descendants of the Founding's Enlightenment figures increased.⁴³

II.

Consider an apparent paradox: Why do serious people oppose ratification of a document that clarifies if not expands the scope of human rights? In the United States, Evangelical Christians⁴⁴ have led opposition to the Convention on the Elimination of All Forms of Discrimination against Women.⁴⁵ Other conservative Christians⁴⁶ as well

42. See, e.g., DECLARATION OF INDEPENDENCE [¶ 11] (U.S. 1776) ("He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."); see also DECLARATION OF INDEPENDENCE [¶ 19] (U.S. 1776) ("For imposing taxes on us without our consent."); See also DECLARATION OF INDEPENDENCE [¶ 22] (U.S. 1776) ("For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments.").

43. See *infra* text accompanying notes 44–68; see also Dienstag, *supra* note 21, at 509–10 ("By paying closer attention to what links Locke to the founding generation, however, we see just as clearly what separates that generation from our own. The principal difference is the Christian foundation for moral and political theory which the founders assume. What was, for them, an unproblematic premise is, today, probably a minority position and certainly a highly controversial one.").

44. Identifying what makes certain Christians "evangelicals" is notoriously challenging. Cf. D.W. BEBBINGTON, *EVANGELICALISM IN MODERN BRITAIN: A HISTORY FROM THE 1730S TO THE 1980S* (1988) (defining evangelicalism in terms of biblicism, crucicentrism, conversionism, and activism) with GEORGE M. MARSDEN, *RELIGION AND AMERICAN CULTURE* (1990) (describing evangelicalism in terms of emphasis on the free individual, education, technique, "back to the Bible" for answers to life's questions, and social reform).

45. See Jennifer Butler, *The Christian Right Coalition and the UN Special Session on Children: Prospects and Strategies*, 8 *INTERNAT'L J. CHILD. RTS.* 351, 354 (2000) ("These [Family Research Council, Focus on the Family, and Concerned Women for America] and other organizations like them have successfully lobbied for the US government to oppose the CRC [Convention on the Rights of the Child] and CEDAW.").

46. For my purposes, the set of "conservative" Christians includes many evangelicals plus conservative elements in non-evangelical Christian traditions including conservative

as Evangelicals have also been vocal in their opposition to adding same-sex orientation to the list of federal hate crimes and to expanding the legal scope of marriage to same-sex couples.⁴⁷ Similar voices have been raised in Australia in resistance to the proposed Charter of Rights.⁴⁸ John Witte has observed that “[o]ne of the ironies of the contemporary human rights movement is the relative silence of the modern Protestant Churches.”⁴⁹ Are “religious” people generally—at least Evangelical and conservative Christian ones—opposed to human rights? Any tension between Evangelicals and the contemporary human rights movement⁵⁰ is of relatively recent vintage.

Many Evangelicals and other conservative Christians have pressed the case for recognition of human rights in places like Darfur and are working to vindicate human rights through non-governmental organizations like International Justice Mission and Freedom Firm.⁵¹ Thomas F. Farr has written that the influence of Evangelicals was important in passing the International Religious Freedom Act⁵² and in pressing the State Department to take seriously the issue of religious freedom in other countries.⁵³ So what accounts for such spirited opposition to certain rights while and strong support for others?

Roman Catholics. The original signers of the Manhattan Declaration (<http://www.manhattandeclaration.org/sign/list-of-religious-leaders-signatories>) exemplify this expanded set.

47. See Lara Schwartz, Ithti Toy Ulit & Deborah Morgan, *Straight Talk About Hate Crimes Bills: Anti-Gay, Anti-Transgender Bias Stalls Federal Hate Crimes Legislation*, 7 GEO. J. GENDER & L. 171, 184 (2006) (“Organizations like the Concerned Women for America, Focus on the Family, the Family Research Council and other groups that have consistently opposed GLBT-inclusive legislation also oppose a federal hate crimes law.”).

48. See Patrick Parkinson, *Christian Concerns with the Charter of Rights*, SYDNEY L. SCH. LEGAL STUD. RES. PAPER 09/72 (2009), available at <http://ssrn.com/abstract=1465125>.

49. Witte, *supra* note 13, at 84. Witte does not mean that many Protestant Christian churches do not speak about human rights but that, when they do, they “have been content simply to confirm human rights norms and to condemn human rights abuses without deep corporate theological reflection.” *Id.*

50. See Henry J. Steiner & Philip Alston, *Preface*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS iv (2d ed., 2000) (defining the “human rights movement” collectively as “post-1945 governmental, intergovernmental and nongovernmental developments, in both national and international contexts, in the recognition and protection of human rights.”).

51. See, e.g., INTERNATIONAL JUSTICE MISSION, <http://www.ijm.org/> (last visited Apr. 5, 2011); FREEDOM FIRM, <http://www.freedom.firm.in/> (last visited Apr. 5, 2011).

52. See THOMAS F. FARR, WORLD OF FAITH AND FREEDOM 111–33 (2008).

53. *Id.* at 135–60.

There are at least three reasons for the inconsistent embrace of the human rights movement among Evangelicals. First, human rights in the leading instruments⁵⁴ are expressed in individualistic categories.⁵⁵ Associations, whether natural like the family or transcendent like the Church, are outside the formal structure of human rights.⁵⁶ The right of individuals to form associations garners respect but the rights of associations—in the terms of the significant human rights instruments—are purely derivative; individuals have rights to associate but associations have only whatever rights the local political process permits.⁵⁷ Of course, one can simply note that the adjective “human” by definition excludes rights of entities such as the family and Church and that such an exclusion does not entail lack of rights. The rhetorical force of the virtually exclusive focus on individual human rights, however, seems destined to make conception of the rights of entities ever more difficult to comprehend much less recognize.⁵⁸

54. See, e.g., UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A, art. 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (UDHR); INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8 (ICCPR); INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 8 (ICESCR); CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, Dec. 18, 1979, 1249 U.N.T.S. 13 (1981) (CEDAW).

55. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1990) (“[T]he idea of human rights is that the individual counts . . .”). Of the human rights described in the three leading human rights documents (the Universal Declaration of Human rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), only the right to self-determination of peoples is not a right of individual persons.

56. *Id.* at 5 (“Human rights, as conceived by and specified in the Universal Declaration and other international instruments, are the rights of individuals. . . . [T]he essential human rights idea addresses the rights of the individual, not of any group or collectivity.”); see also Steiner & Alston, *International Human Rights in Context*, *supra* note 50, at 143 (“Individual rights characterize these instruments. Group or collective rights . . . are rare.”).

57. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991) (criticizing concentration of human rights movement on “the individual and the state at the expense of the intermediate groups of civil society.”). Others have raised similar concerns about the “state-centric” nature of human rights for different reasons. See, e.g., Oche Onazi, *Towards a Subaltern Theory of Human Rights*, *GLOBAL JURIST*, Vol. 9, Issue 2, 2009, at 1 (“[T]he reality of statist human rights discourse suggest that it has had a limited impact on the lives of ordinary people.”)

58. See, e.g., Matthew W. Clark, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 *SUFFOLK U. L. REV.* 871 (2007–2008); Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 *DUKE J. GENDER L. & POL’Y* 297 (2008). Even the most recent human rights

Those who are not fully enamored with the contemporary idea of human rights⁵⁹ may not be concerned only about the absence of entity rights but about the rationale for certain limits of individual human rights. Louis Henkin stands for many when he notes that “[i]mplicit political-moral principles accept limitations on individual rights for the common good”⁶⁰ What counts for the common good is, to say the least, a contested notion. Moreover, once a political system permits limits on the exercise of human rights by the political process, the risk of reducing rights to only one factor among many in a utilitarian calculus will quickly become reality.⁶¹ For example, the failure of the right to own property to carry over from the Universal Declaration of Human Rights⁶² to the International Covenant on Civil and Political Rights causes concern that the instruments of the human rights movement may be deployed against politically disfavored individuals or groups. These contemporary formulations make human rights relative, not absolute.

Third, the incoherence of the proffered foundations for human rights concerns many. Louis Henkin elaborates the non-foundational

instrument, the CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, <http://www.ohchr.org/Documents/Publications/newCoreTreatiesen.pdf> (2006), subordinates the interests of the family to the rights of the disabled individual. See Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. R. L. REV. 1, 25 (2008) (“The CRPD privileges the rights of persons with disability over those of family members . . .”).

59. Michael Perry describes the “idea of human rights” as generally as possible:

[T]here 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.

MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 13 (1998). The idea of human rights is distinct from the human rights movement. See *supra* note 50. Quarrels with the later do not entail rejection of the former.

60. See HENKIN, *supra* note 55, at 9; see generally ICCPR, *supra* note 54, Arts. 18, 19, 21, and 22 (couching limits on the prescribed rights in broad and vague categories).

61. Henkin acknowledges as much when he muses that “limitations on individual liberty or property are to be justified on notions of equity and practicability and some uncertain blend of the rights idea with utilitarian dedications to the ‘general welfare’ or to maximum total happiness.” *Id.* Alarmed by the inconsistency of the notions of rights circumscribed by appeals to quantitative happiness, Henkin asserts that “[t]he rights idea, however, rejects the extreme utilitarian position that would justify even the complete sacrifice of individuals if it would increase total happiness.” *Id.* Henkin offers no argument for this assertion.

62. See UDHR, *supra* note 54, Art. 17(1) (“Everyone has the right to own property alone as well as in association with others.”).

approach of the human rights movement when he writes that “[t]he international expressions of rights themselves claim no philosophical foundation, nor do they reflect any clear philosophical foundation, nor do they reflect any clear philosophical assumptions; they articulate no particular moral principles or any single, comprehensive theory of the relation of the individual to society.”⁶³ Jack Donnelly simply concludes that “[t]here is no strong foundation for human rights”⁶⁴ Yet, it would seem that providing a foundation for human rights is important at the least when dealing with those who deny their existence.⁶⁵ Moreover, rights untethered to an account of what it means to be human and what the end or purpose of human existence leads to twin risks: failure to identify a legitimate human right (or rights bearer) and creation of putative human rights that are no more than aspirations for a particular (and perhaps contested) good.⁶⁶ As Don Browning has concluded:

63. *Id.* at 6; see also Steiner & Alston, *International Human Rights in Context*, *supra* note 50, at 143 (“Both the UDHR and ICCPR are terse about their derivations or foundations in moral and political thought.”). Cf. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 76 (2001) (discussing 1947 work of the philosophers’ committee of the United Nations Educational, Scientific and Cultural Organization (UNESCO), which reviewed human rights from many perspectives and concluded that the principles underlying the UDHR “were present in many cultural and religious traditions”) *with id.* at 77 (noting that the philosophers’ committee “harbored no illusions about how deep the agreement they discovered went”).

64. DONNELLY, *supra* note 20, at 20. Donnelly completes his sentence with the following remark: “or, what amounts to the same thing, there are multiple, often inconsistent, ‘foundations.’” *Id.* Observing inconsistent foundations for human rights is hardly the same as proving that no foundation exists. Donnelly confuses the psychological with the ontological.

65. See, e.g., ADAMANTIA POLIS & PETER SCHWAB, *HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES* 1–18 (1979).

66. Donnelly represents many when he uses John Rawls’s concept of overlapping consensus in lieu of an accounting for human rights. See DONNELLY, *supra* note 20, at 40–41. Donnelly fails to take seriously the point that Rawls was articulating a theory to justify *political* liberalism, not moral theory. While *POLITICAL LIBERALISM* may accurately describe its subject, it does not explain why liberalism is true. Donnelly brushes aside this problem as insoluble (“Like all social practices, human rights come with, and in an important sense require, justifications. But those justifications appeal to ‘foundations’ that are ultimately a matter of agreement or assumption rather than proof.” *Id.* at 21.) and thus irrelevant (“[T]his is less of a practical problem than one might imagine.” *Id.* at 20.). Many who take their “comprehensive convictions” seriously are not so sanguine about such a casual dismissal of their concerns. For extended discussions of the use of liberal concepts like equal concern and respect as ersatz comprehensive convictions, see Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious*, in *RELIGION AND CONTEMPORARY LIBERALISM* 138 (Paul J. Weithman ed., 1997) and Nicholas

Today, modern human rights thought . . . largely stands devoid of critical grounding. . . . What remains is a list of subjective natural rights that are asserted more or less independently of any theory of objective natural rights. They function as an unchecked wish list, in which these rights increasingly seems to contradict each other, sow seeds of distrust and disregard among the nations of the world, and get used as tools of manipulation by various interest groups around the world to accomplish their own particular political and legal goals.⁶⁷

For these reasons, there are non-revanchist elements among Evangelical and conservative Christians that would eschew the human rights movement altogether.⁶⁸

The failure of the human rights movement to identify a single foundation may seem inevitable. When the range of potential accounts for human rights spans from various secular philosophies to inconsistent religious versions, the possibility of consensus around unified account is vanishingly small.⁶⁹ While the development of human rights out of the Western Christian matrix⁷⁰ is not proof of the validity of that tradition,

Wolterstorff, *The Role of Religion in Decision and Discussion of Political Issues*, in RELIGION IN THE PUBLIC SQUARE 67 (Robert Audi ed., 1997).

67. Don S. Browning, *The United Nations Convention on the Rights of the Child: Should It Be Ratified and Why?*, 20 EMORY INTERNAT'L L. REV. 157, 172–73 (2006).

68. See David M. Smolin, *Church, State, and International Human Rights: A Theological Appraisal*, 73 NOTRE DAME L. REV. 1515, 1538 (1997–1998) (“[T]he language of human rights will in time prove itself inadequate to the task of expressing Christian concern and compassion for others, even on a political level. The very language of human rights, particularly in our contemporary Western context of narcissism, individualism, social decadence, and religious apostasy, sends the wrong message regarding the relationship of the individual to society and the human person to God.”). The same may be said with respect to some conservative Roman Catholics. See, e.g., ROBERT P. KRAYNAK, *CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD* 153 (2001) (“Christianity actually has a deep resistance to the concept of human rights.”).

69. See MEILAENDER, *supra* note 2, at 90 (“Our most fundamental moral convictions, precisely because they are fundamental, cannot be deduced from or proven by any more basic moral truths.”).

70. See Brian Tierney, *The Idea of Natural Rights—Origins and Persistence*, 2 NORTHWESTERN J. OF INTERNAT'L & HUM. RTS. 2, 4 (2004) (“In presenting the origins and early history—a sort of “Ur-history”—of the idea of natural rights, I shall necessarily be describing a Western construct.”); see also Zachary R. Calo, *Religion, Human rights and Post-Secular Legal Theory*, available at <http://ssrn.com/abstract=1754073> (“That human rights norms rest, in some sense, on the sacredly tinged language of human dignity should not be a surprise given the extent to which religious traditions, particularly Christianity, fed the development of human rights.”); Veronica Rodriguez-Blanco, *Towards a Concept of Human Rights: Inside and Outside Genealogy*, available at

exploration of what in that tradition has accounted for the development of the idea of human rights could prove edifying to participants in other traditions.⁷¹ In other words, there may be underappreciated strands of thought or practice within other religious traditions that could prove helpful in identifying human rights and distinguishing them from other goods.⁷² Moreover, analyzing elements of the Christian tradition that successfully provide an account for human rights for those within that tradition may strengthen their commitment to the consistent elements of the contemporary human rights movement. Of course, opposition by followers of that tradition will ensue to the extent that contemporary human rights discourse is inconsistent with a Christian account. While the prospect of public displays of such fundamental disagreements may not be pleasing, it is appropriate if only to acknowledge the dignity of all participants in the human rights discourse.

III.

At this point, this Article will focus on the last of the problems identified above—the lack of a foundation for human rights. This Article will leave to others the specification of particular inherent human rights. Analysis of a Christian fulcrum for human rights can prove useful to the extent that others in the debate are as forthcoming in analyzing the foundations of their own commitments. Moving from an abstract to a particular foundation, one grounded in a specific historical and theological tradition, may also prove helpful in advancing a discussion of human rights among the growing number of post-secular writers in the field of human rights.⁷³

<http://ssrn.com/abstract=1749787> (“Philosophies of human rights [are] loaded with Kantian or Christian nuances.”).

71. See, e.g., ARVIND SHARMA, ARE HUMAN RIGHTS WESTERN? 23 (2006) (“If one keeps in mind that concepts or ideas developed in a Western context are at best tentative efforts to penetrate complex realities and that they may not be wholly applicable to moral and religious traditions elsewhere, this approach can provide an interpretive guide through diverse religious and moral traditions.”).

72. For examples of efforts to develop an account of human rights within other religious traditions, see ABDULLAHI AHMED AN-NA’IM, ISLAM AND THE SECULAR STATE (2008); WILLIAM SCHWEIKER, HUMANITY BEFORE GOD: CONTEMPORARY FACES OF JEWISH, CHRISTIAN AND ISLAMIC ETHICS (2006).

73. See, e.g., RAYMOND GEUSS, HISTORY AND ILLUSION (2001); BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED (2005). Both Geuss and Williams focus on the genealogy of human rights and generally eschew the notion of a universal morality of human rights. See generally Rodriguez-Blanco, *supra* note 69, at 6 (“Their aim is to unmask, or unravel,

A.

More than any other factor, human dignity is cited as the moral ground of human rights.⁷⁴ Yet the assertion of human dignity receives more attention than an explanation of what accounts for it.⁷⁵

When the question of the foundation of human dignity is addressed, frequently the exercise of a human capacity for something or other (typically reasoning) supplies the rationale.⁷⁶ Many Evangelicals are not persuaded that the capacity to reason grounds human dignity. The profoundly mentally handicapped, those in a persistent vegetative state, and those suffering late-term dementia cannot reason yet virtually

the contingency of our human existence.”). With respect to such approaches, Zachary Calo writes:

The defining characteristic of this project is the shifting of focus from the universal to the particular. Rather than articulating an account of human rights on neutral, universal terms, it does so on the basis of particularistic normative worldviews, including religious traditions. It thus replaces a universal logic with a theological logic and invites communities of religious meaning to participate in discourse concerning human rights and human goods without starting from a secular premise.

Calo, *supra* note 70, at 18.

74. See, e.g., UDHR PREAMBLE, *supra* note 54, para. 1 (“Whereas, recognition of the inherent dignity . . . of all members of the human family . . .”); see also DAVID KRETZMER & ECKART KLEIN, *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (2002); RICHARD AMESBURY & GEORGE M. NEWLANDS, *FAITH AND HUMAN RIGHTS: CHRISTIANITY AND THE GLOBAL STRUGGLE FOR HUMAN DIGNITY* xiv (2008) (“The core idea of human rights—that every human being has dignity . . .”); CATECHISM OF THE CATHOLIC CHURCH ¶ 357 (1994) (“Being in the image of God the human individual possesses the dignity of a person . . .”).

75. Peter Singer has challenged the “nonsense upon stilts” nature of ungrounded human dignity. See Peter Singer, *A Convenient Truth*, *THE NEW YORK TIMES*, Jan. 26, 2007; see also Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993* 111, 116 (1993) (declaring “human rights foundationalism” to be “outmoded”); FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 142 (Walter Kaufmann & R.J. Hollingdale eds., 1967) (1888) (“Through Christianity, the individual was made so important, so absolute, that he could no longer be sacrificed . . . All ‘souls’ became equal before God: but this is precisely the most dangerous of all possible evaluations! If one regards individuals as equal, one calls the species into question . . .”); Onazi, *supra* note 57, at 14 (“The prevailing understanding of human rights . . . is primarily driven by a western, liberal and individual notion of dignity.”).

76. See, e.g., RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 84 (1993) (“The life of a single human organism commands respect and protection . . . finally, when mental life has begun and flourishes . . .”).

all Evangelicals believe such persons retain their human dignity.⁷⁷ If not reasoning, then freedom in the Kantian sense of unconstrained choice supplies a contemporary account for human dignity.⁷⁸ Kantian freedom ultimately proves incoherent.⁷⁹ Dignity, tethered to abilities such as reasoning or even the capability to choose, is an under-inclusive foundation for human rights.

Without a foundation, the limits of “dignity” are cabined by little more than the imagination of the proponent of some cause or other—including the human rights movement. “[T]he use of ‘dignity,’ beyond a basic minimum core,” writes Christopher McCrudden, “does not provide a universalistic, principled basis for judicial decision-making in the human rights context.”⁸⁰ Indeed, “there is little common understanding of what dignity requires substantively within or across jurisdictions.”⁸¹ Even Martha Nussbaum, whose influential work will be considered later, grounds human dignity in the moral sentiment of awe: “We see the person as having activity, goals, and projects – as somehow awe-inspiringly above the mechanical workings of nature”⁸²

77. NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* 329–33 (2008).

78. See, e.g., Rorty, *Human Rights*, *supra* note 75, at 124–25. (“Kant’s account of the respect due to rational agents . . . is an excellent suggestion But it has never been backed up by an argument based on neutral premises, and it never will be.”).

79. See C. Scott Pryor, *Consideration in the Common Law of Contracts*, 18 REGENT U. L. REV. 1, 28–29 (2005–2006); see also MEILAENDER, *supra* note 2, at 28–29 (summarizing argument that an ethical theory founded only upon choice cannot account for nature of human life); *id.* at 89 (“The great problem with this approach though is that, in attempting to salvage personal dignity, it may lose the body and the human dignity of bodily life.”).

80. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. OF INT’L L. 655 (2009).

81. *Id.*

82. NUSSBAUM, *supra* note 1, at 73. The first half of the paragraph from which this quote is taken reads as follows:

The idea of human dignity has broad cross-cultural resonance and intuitive power. We can think of it as the idea that lies at the heart of tragic artworks, in whatever culture. Think of a tragic character, assailed by fortune. We react to the spectacle of humanity so assailed in a way very different from the way we react to a storm blowing grains in the wind. For we see a human being as having worth as an end, a kind of awe-inspiring something that makes it horrible to see this person beaten down by the current of chance – and wonderful, a the same time, to witness the way in which chance has not completely eclipsed the humanity of the person.

The beauty of Nussbaum’s prose should not obscure its foundation in intuition, an intuition that may not be shared by all. There are certainly many people whose response

Grounding assertions of the universal and the absolute in in fleeting and inconsistent human sentiments provides scant support for human dignity. Assertions of human dignity nonetheless continue to carry rhetorical weight but as time progresses one can imagine a world in which dignity's ubiquity will undercut its utility.⁸³ Arguments over human rights create more heat than light.⁸⁴ Only the rhetorical force of attaching the term "human right" to a particular good is the primary reason "rights-talk" remains so powerful.⁸⁵

B.

While the heyday of philosophical foundationalism has passed, the place of foundations continues to play a role in political and legal discussions. Among virtually all strands within the Christian tradition, writers about human rights generally and human dignity in particular have founded their reflections in the theological concept of the image of God in man.⁸⁶ *Genesis* 1:26–27 is the *locus classicus* for this doctrine:

²⁶Then God said, "Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth."²⁷ So God created man in his own image, in the image of God he created him; male and female he created them.⁸⁷

to the vicissitudes of others' misfortune is not awe but malicious glee. See *infra* text accompanying note 108.

83. That time may already have arrived. See Steven Pinker, "The Stupidity of Dignity," in *The New Republic* (May 28, 2008).

84. See Brad Hooker, *Review of* JAMES GRIFFIN, *ON HUMAN RIGHTS*, 30 *OX. J. LEG. STUD.* 193 (2010) ("The rhetorical power of claims made in the name of human rights seduced many people and groups into stating their moral claims in terms of human rights. Moral claims made in the name of human rights thus proliferated wildly. Proliferation was so widespread as to threaten not only to debase the rhetorical power of the term "human right" but also to blur conditions for appropriate application of the term. The practical result has been a series of heated but unclear debates.").

85. TAYLOR, *supra* note 7, at 479.

86. See D.J.A. Clines, *The Image of God in Man*, 19 *TYNDALE BULL.* 53 (1968) (surveying various views of meaning of image of God); see also MILLARD ERICKSON, *CHRISTIAN THEOLOGY* 498–510 (1985) (summarizing principal views of image of God in Christian theology).

87. All quotations from the Bible are taken from the English Standard Version (2001) unless otherwise noted. *Genesis* 9:6 is also often cited as a bridge between human beings as bearing God's image and rights ("Whoever sheds the blood of man, by man

What does this brief statement mean? The quantity of theological analysis of this passage from both Jewish and Christian scholars is overwhelming and inconsistent.⁸⁸ Turning to his recent discussion of inherent moral rights, the efforts of analytic philosopher Nicholas Wolterstorff can prove helpful.⁸⁹

Wolterstorff begins by analyzing the concept of “a right” and only later moves to considering a foundation for rights. What makes a relationship to a particular state of affairs one of right? What distinguishes that state of affairs that constitutes a good in one’s life from that state of affairs to which one has a right? Put another way, what makes a wrong? “[T]o wrong a human being is to treat her in a way that is disrespectful of her worth,” asserts Wolterstorff.⁹⁰ What does it mean to “disrespect” or under-respect someone? The concept of under-respect presupposes three things. First, the existence of a duty of respect presupposes that human beings have non-instrumental worth; if they did not, then rights *qua* a person’s humanity could increase, decrease, or even vanish with the vagaries of her usefulness. Human rights—at least inherent ones—could not exist.⁹¹ In the contemporary world, we would be thrust to either a hortatory fiat or a utilitarian calculus when asserting a right.⁹² Non-instrumental value of the human subject is an analytic requirement for an enduring duty of respect.

shall his blood be shed, for God made man in his own image.”). See *infra* text accompanying notes 128–133.

88. See, e.g., I-II THOMAS AQUINAS, *SUMMA THEOLOGICA* q. 93, art. 4, at 471 (Fathers of the English Dominican Province, Benziger Bros. 1948 (1274)) (asserting that all humans share in God’s image and likeness); *id.*, art. 6, at 473 (concluding that the image is found in man’s mind); JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* I.xv.3, at 186–88 (John T. McNeill, ed., Ford Lewis Battles, trans., 1960 (1559)) (describing foundation of image of God in man’s soul but extending to human faculties, powers, and even the body); *id.*, I.xv.4, at 190 (rejecting the function of exercising dominion as the expression of image of God in humans).

89. WOLTERSTORFF, *supra* note 77. This is not to suggest that Wolterstorff’s foray into this topic is entirely analytic; he devotes several pages to exegetical and historical theology of the meaning of the expression “image of God.” See *id.* at 342–47.

90. *Id.* at 296.

91. See Craig A. Stern & Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 U.M.K.C. L. REV. 939 (2008) (distinguishing between an inalienable human right to *x* and the alienable *x*, the object of the right). The authors go on to conclude that the concept of “inalienable rights rel[ies] on the truth of a moral order that is counter to limitless individual autonomy. *Id.* at 971. In other words, “natural inalienable rights do require—presuppose—some transcendent law order.” *Id.* at 972.

92. From a utilitarian perspective, inalienable rights that inhere in one’s humanity do not exist; rights serve only a “boosting” function. If the label “right” is assigned to the holder’s relationship to some good, the utilitarian moral calculus merely increases the

Second, the existence of wrongs presupposes that certain (in)actions can have a “respect/disrespect” import; to say otherwise would deny human agency⁹³ and effectively undercut the existence of rights. If we do not presuppose that humans act with intentionality, that is, with a view to bringing about a particular state of affairs, we would conclude that they lack agency.⁹⁴ It is because they lack agency that we conclude that non-agent actors like inanimate objects do not have rights;⁹⁵ nor can such objects wrong one who has rights: One cannot sue the meteorite that obliterates her home. While it is certainly possible that the quartet of the profoundly mentally handicapped, those in a persistent vegetative state, and those suffering late-term dementia lack agency, this entails only that they cannot wrong another person, not that they have no rights.

Finally, a wrong has been committed when the respect/disrespect import of an (in)action is out of accord with the non-instrumental worth of the other. In other words, under certain conditions, an agent can act in such a way as not to respect the worth due another; he can commit a wrong. If someone has been wronged, she must first have had a right. Combining these presuppositions, we can conclude that rights are not utilitarian boosters but trumps. Unlike boosters that add some points to a utilitarian calculation, one who plays the trump card of a human right takes the hand: “If I have a right against you to the good of some action on your part,” writes Wolterstorff, “then your performing that action is

holder’s entitlement to that good. Thus, if the net of the goods and evils of one’s experience of a state of affairs are positive or at least equal, any agent who denies that good has committed a wrong. Unfortunately, how to weigh the individual and collective life goods and evils, how to compare the sums so calculated, and at what point to decide enough is too much—that my right to a life good is so outweighed as to justify its deprivation—is exceedingly difficult. Wolterstorff observes that the problem with the “rights-as-booster” approach is that it undercuts the very notion of rights. *Id.* at 291–96. In the utilitarian account, no one has an absolute right to *x* against which that person’s right to *x* is to be weighed. Thus, if one’s “right” to life-good *x* can at some point be overridden by enough goods of enough others, then it is not wrong to deprive that one of *x*. And if it’s not wrong to deprive one of *x*, then one never had a right to *x* in the first place. *Id.* (“To deny that human beings have non-instrumental worth is to deny by implication that they have moral rights . . .”). At best, the idea of rights-as-booster is fraught with danger; at worst, it is incoherent.

93. See generally Sarah Buss, “Personal Autonomy,” *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/fall2008/entries/personal-autonomy/>.

94. See GRIFFIN, *supra* note 10, at 33 (2008).

95. Which is not to say that one who a right to an inanimate object cannot be wronged by another’s (in)action with respect to it.

to take precedence for you over *whatever balance of life-good and evils might ensue . . .*”⁹⁶ Without presupposing non-instrumental human worth, agency, and a relationship between the two, the idea of a human right—a claim to (in)action that exists at all times in all circumstances—makes no sense. The balancing that accompanies many of the putative human rights in contemporary human rights instruments⁹⁷ demonstrates that they are not rights so understood; rather, they are goods that political or other entities should endeavor to safeguard or provide, as the case may be. The relative paucity of inalienable rights in the Founding era—life, liberty, and the pursuit of happiness—demonstrates such a rigorous, analytic understanding of rights. The amalgam of such rights with other goods characterizes the contemporary human rights movement.

96. *Id.* at 291 (emphasis added). The clarity of a right as a trump contrasts sharply with the concept of rights as boosters when it comes to the perennial problem of “balancing rights.” Human rights cannot be played against other rights; exercising a human right cannot be a wrong. On Wolterstorff’s account there are no set of existing or potential life-goods that can compromise a human right. Balancing is entirely appropriate, however, when it comes to allocating goods to which no one has a human right. Distribution of goods based on consanguinity, propinquity, or mere caprice does no wrong those to whom the goods were not distributed. Alternatively, the need to balance rights may reveal an improperly stated right. Vagueness and over-breadth are common errors in the specification of human rights. See, e.g., UDHR, *supra* note 54, Art. 15(1) (“Everyone has the right to a nationality.”); Art. 22 (“Everyone, as a member of society, has the right to social security and is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”); Art. 24 (“Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”). See WOLTERSTORFF, *supra* note 77, at 315 (“[T]hese are fake rights, pseudo rights.”). Wolterstorff takes the argument that rights are trumps from RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). James Griffin has strongly challenged Dworkin’s understanding of rights as trumps. See GRIFFIN, *supra* note 10, at 20. Griffin’s observation that rights are often balanced against the general welfare is beside the point when the rights in question are not human rights but constitutional, civil, political, legal, or private rights. Following Wolterstorff, I take the position that only human rights are properly trumps over the general welfare. Dissenting from Wolterstorff, I do not agree that claims to certain life-goods such as paid holidays are not rights; they are not human rights but may well be public or private legal rights.

97. *Id.*

C.

1.

Focusing on the third of these factors, what accounts for the presupposition that human beings have non-instrumental worth? Historically, reasoning was suggested.⁹⁸ Currently we observe that either the actual exercise of certain qualities (e.g., rational reflection on ends as well as means⁹⁹ and application of moral judgments) or the potential to exercise certain powers are put forward to account for the non-instrumental worth of humans.¹⁰⁰

Following Martha Nussbaum, a leading contemporary human rights theorist, we can combine both qualities and potentialities into human “capabilities.”¹⁰¹ Nussbaum’s approach lists ten such capabilities: life, bodily health, bodily integrity, sense/imagination/thought, emotions, practical reason, affiliation, other species, play, and control over one’s environment (political and material).¹⁰² Several of these capabilities fit neatly within the Declaration’s list of life and liberty. The others might be subsumed into the pursuit of happiness.¹⁰³

However, it is clear that not all humans are permitted to exercise these capabilities. Throughout the world if not in America, poverty and hunger as well as institutional oppression make it impossible for many to exercise these capabilities. The failure of a socio-political order to allow all persons within its scope to develop such capabilities, according to Nussbaum, is unjust.¹⁰⁴ From the perspective of the capabilities

98. See Jon Wetlesen, *Inherent Dignity as a Ground of Human Rights*, in *REVOLUTION AND HUMAN RIGHTS* 109–10 (Werner Maihofer ed., 1990) (discussing efforts to include reason as a ground for human dignity in the UDHR).

99. See GRIFFIN, *supra* note 10, at 44–48.

100. See generally Wetlesen, *supra* note 98, at 98–114.

101. Martha Nussbaum has written extensively that human capabilities, not a particular capacity, ground dignity and hence the universality of human rights. See NUSSBAUM, *supra* note 1, at 5 (“I shall argue that the best approach to this idea of a basic social minimum is provided by an approach that focuses on *human capabilities*, that is what people are actually able to do and to be – in a way informed by an intuitive idea of a life that is worth of the dignity of the human being.”).

102. *Id.* at 78–80.

103. See Martha Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 *HARV. L. REV.* 4, 50–53 (2007).

104. See Martha Nussbaum, *Reply to Diane Wood, Constitutions and Capabilities: A (Necessarily) Pragmatic Approach*, 10 *CHI. J. INT’L L.* 431 (2010) (“A familiar understanding of the purpose of government is that it should, at a minimum, secure

approach, a polity's civil government and not its citizens or non-governmental entities is ultimately responsible if its people do not have opportunity to flourish.¹⁰⁵ This is necessarily the case in Nussbaum's approach because virtually all non-governmental entities, including the family, are artifacts of the state.¹⁰⁶ Nussbaum demonstrates that a few of the leading thinkers of the Founding era believed in a role of civil government to enhance certain capabilities of Americans.¹⁰⁷ Nonetheless, she fails to prove that the view of the Constitutional role of the federal government in the Founding era included the power to enact a "capabilities agenda."

Moreover, it is not always the case that it is the failure of the political order that truncates the full development of a citizen's capabilities. Some persons simply have no capabilities due to congenital abnormalities or developmental factors.¹⁰⁸ Nussbaum equivocates on the presence of human dignity and thus the non-instrumental worth of those whose capabilities are severely stunted.¹⁰⁹ Read a certain way, Nussbaum even could be seen to argue that those who fail to exercise any of these capabilities are less than fully human.¹¹⁰ While decrying both

those central entitlements. If it does not, it will not have a claim to be even minimally just.").

105. See NUSSBAUM, *supra* note 103, at 24 ("[T]he C[apabilities] A[pproach] holds that the purpose of government is to promote a set of core necessary conditions for reasonably flourishing lives If that purpose has not been fulfilled, government is ultimately to blame").

106. See NUSSBAUM, *supra* note 1, at 262 ("The family . . . is the artifact of state action").

107. See *id.* at 103

108. Steven D. Smith subjects Nussbaum's "intuitive" approach as the foundation of human capabilities to a sustained critique in *THE DISENCHANTMENT OF SECULAR DISCOURSE* 171–86 (2010). Even if her list of capabilities can be further substantiated, it falls to the objection noted in the text accompanying note 77: not all human beings have all of these capabilities.

109. Nussbaum acknowledges and then dodges this problem when she writes:

At one extreme, we may judge that the absence of capability for a central function is so acute that the person is not really a human being at all, or any longer – as in the case of certain very severe forms of mental disability, or senile dementia. But I am less interested in that boundary (important as it is for medical ethics) than in a higher threshold, the level at which a person's capability becomes what Marx called "truly human," that is, *worthy* of a human being.

NUSSBAUM, *supra* note 106.

110. *Id.* at 87 ("It is perfectly true that functionings, not simply capabilities, are what render a life fully human in the sense that if there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained.").

utilitarianism and libertarianism,¹¹¹ Nussbaum's emphasis on choice and the opportunity to choose root her approach firmly among the proponents of autonomy as the center of what it means to be human.¹¹² Such a foundation is unacceptable to any who, like most Evangelicals, are unwilling to conclude that any human lacks non-instrumental worth.

2.

On a distinctively Christian view, however, it is divinely bestowed (or imputed) worth that accounts for the dignity necessary to justify for the non-instrumental worth of human beings.¹¹³ All human beings are respect-worthy because, Wolterstorff asserts, God loves them: "I conclude that if God loves . . . each and every human being equally and permanently, then natural human rights inhere in the worth bestowed on human beings by that love. Inherent human rights are what respect for the worth of God's love requires."¹¹⁴

While it is certainly the case that God's love would provide a foundation for the non-instrumental worth of human beings, some Evangelicals would balk at Wolterstorff's claim that God universally and permanently loves all human beings. At the very least, they could observe that the Bible seems to teach otherwise at some points.¹¹⁵ Rather than pursue this internal argument, however, this Author suggests an alternative account for God's valorization of human beings that returns to the key passage in *Genesis* quoted above. The late theologian Meredith G. Kline concluded that God's very creation of human beings "with his

111. *Id.* at 17-24.

112. *See, e.g., id.* at 10 ("What respect [for human beings] centrally involves . . . is supporting human beings in the development and exercise of some central human abilities, especially prominent among which is the faculty of selection and choice."); *id.* at 11 ("[T]he most important human powers, including the power of choice . . ."); *id.* at 14 ("(6) *Centrality of Choice*. The goal of CA is capability, because respect for people's power of choice is at the center of the entire approach."); *id.* at 15 ("The CA . . . aims at a nation of free choosers Choice is seen as crucial for citizenship . . ."). What is to be made of those who lack the capability to choose is not addressed.

113. *See* WOLTERSTORFF, *supra* note 77, at 353 (arguing that being loved by God is the worth-imparting quality of human beings).

114. *Id.* at 360. Wolterstorff's use of the subjunctive is puzzling because only a paragraph later he confirms the reasonable supposition that he holds as true his assertions of God's universal and permanent love for all human beings. *Id.*

115. *See, e.g., Romans* 9:13 ("As it is written, 'Jacob I loved, but Esau I hated.'") (alluding to *Malachi* 1:2-3); *see generally* WESTMINSTER CONFSSION OF FAITH, *supra* note 25, Chapter 32.1 ("And the souls of the wicked are cast into hell, where they remain in torments and utter darkness, reserved to the judgment of the great day.").

image in the beginning was . . . to create mankind in a covenant of marriage, as bride of the Maker-Lord, with all the commitment of promise *and obligation* inherent in such an alliance."¹¹⁶ This inherent moral obligation is bilateral, not unilateral; not only do humans have a moral obligation to respect God, God, by creating humans in his image, has a moral obligation to respect them. In other words, by choosing to create "in his image," justice required that God respect the worth of such a creature.¹¹⁷ It follows that God's respect for his human creation entails a duty of intra-human respect, which in turn grounds their non-instrumental worth.

In addition to the text of *Genesis* 1:26–27, Kline makes a second argument to support his conclusion that the creation of human beings in God's image entails their non-instrumental worth. He argues that the presence of God's Spirit at the outset of creation,¹¹⁸ coupled with the subsequent investiture of humanity with God's image, anticipated the connection of "enrobing" with the establishment of other covenants recorded in the Bible.¹¹⁹ Much like contemporary judicial robing ceremonies, enrobing in the Ancient Near East carried significant cultural overtones.¹²⁰ Ten of the twenty-seven references in the Hebrew Scriptures to the noun *m'îl* (robe, outer garment) occur in the books of *Exodus* and *Leviticus* where it denotes an item of clothing of the high

116. MEREDITH G. KLINE, *KINGDOM PROLOGUE* 12 (1993) (emphasis added). For an account of the obligations that inhere in kinship bonds see MEILAENDER, *supra* note 2, at 16.

117. Kline provides a theological foundation for Wolterstorff's assertion that there must be reciprocal "standing rights" between God and human beings for there to be a moral (as opposed to a purely prudential) obligation to obey God's commands. See WOLTERSTORFF, *supra* note 77, at 281–84.

118. *Genesis* 1:2 ("The earth was without form and void, and darkness was over the face of the deep. And the Spirit of God was hovering over the face of the waters.").

119. See KLINE, *KINGDOM PROLOGUE*, *supra* note 116, at 11 ("Before the first creative fiat is heard in *Genesis* 1:3, the divine speaker is portrayed in *Genesis* 1:2 as God the Spirit [T]his form of divine presence is to be identified with the Glory-cloud epiphany. At the ratification of the old covenant at Sinai, this cloud-pillar form of theophany represented God standing as witness to his covenant with Israel. Once again, at the ratification of the new covenant at Pentecost, it was God the Spirit, appearing in phenomena that are to be seen as a New Testament version of the Glory-fire, who provided the confirmatory divine testimony. . . ."). The complexity of Kline's prose points to the difficulty of expressing the doctrine of the image of God in conceptual form.

120. See, e.g., NICOLAS WYATT, 'THERE'S SUCH DIVINITY DOT' HEDGE A KING:' SELECTED ESSAYS OF NICOLAS WYATT ON ROYAL IDEOLOGY IN UGARITIC AND OLD TESTAMENT LITERATURE 199 (2005).

priest.¹²¹ Its other uses describe “an outer garment worn by people of rank.”¹²² As Kline observes, “[o]ne of the biblical figures for the bestowing of the divine image on man is that of covering him with a robe emblematic of God’s glory. The outstanding instance of this symbolism in the Old Testament is found in the placing of the sacred vestments on the high priest of Israel.”¹²³ Within the Christian tradition, the metaphorical “enrobing” of humanity with God’s Spirit at creation is consistent with creating humanity in God’s image and the unique valorizing of human beings. Humanity’s status as a divinely enrobed race of priests entails its non-instrumental value. Each human being, regardless of any lack of capabilities, has dignity sufficient to ground human rights.

3.

Humanity was created in covenant with God, a relationship with stipulations with concomitant rewards and penalties.¹²⁴ The covenantal form of the divine-human relationship, and not some particular human quality or power or even capability, frames the concept of “image of God.” Although Kline was not a political theorist, he observed that since the fall of humanity into a state of sin, “correction” is one of the core functions of human government (the “city”):

121. See 2 NEW INTERNATIONAL DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS 1018 (Willem A. VanGemeren ed., 1997)

122. *Id.*

123. KLINE, *supra* note 116, at 11; see also JAMES B. JORDAN, THROUGH NEW EYES: DEVELOPING A BIBLICAL VIEW OF THE WORLD 174 (1988) (identifying the robe as emblem of post-lapsarian judicial authority).

124. *Id.* at 12 (“In a special sense then, the particular divine fiat to create man as one invested with the Glory-image of God was a covenantal fiat. [It is] patent that the covenantal relationship of God and man had its origin in the very act of creating man The covenantal character of the original kingdom order as a whole and of man’s status in particular was given along with existence itself.”). Wolterstorff rejects this “structural/relational” account of the image of God as the foundation of human dignity. See WOLTERSTORFF, *supra* note 77, at 348–52. Notwithstanding his efforts to distinguish his position from “functional” approaches to the image of God, I believe Wolterstorff continues to identify the image of God with human functions or capacities. On Kline’s understanding, by contrast, God clothes humanity with his image by divine fiat; it is what we are, not what we do. For Kline’s sustained (albeit recondite) treatment of this topic see MEREDITH G. KLINE, IMAGES OF THE SPIRIT 26–33 (1980). For an extended analysis of the same topic in terms of personal dignity from a neo-Aristotelian perspective see generally MEILAENDER, *supra* note 2.

Positive regulation of societal order and direction of cultural endeavor must now be supplemented by an enforcing of justice through penal sanctions. As a major means used in his [God's] common grace to restrain the manifestation of man's depravity, God assigns to city government the responsibility to act as his agent for the protection of the community by repressing and punishing evil-doing.¹²⁵

Because human beings have inherent worth and stand in a structural covenantal relationship with God, they can be both victims of injustice¹²⁶ as well as God's agents of correction.¹²⁷

This Christian account of humanity's creation in the image of God accounts for the non-instrumental worth of human beings and their primary human rights. A later text in the Hebrew Scriptures warrants the exercise of secondary, corrective rights to vindicate violations of primary rights. *Genesis* 8:20-9:17 contains what is commonly called the Noahic covenant in which for the first time in the biblical record there is an express delegation by God to human beings of the authority to administer corrective justice. *Genesis* 9:6 recites that, "Whoever sheds the blood of man, by man shall his blood be shed." Like *Genesis* 1:26-27,¹²⁸ this text has generated enormous and highly contested interpretations.¹²⁹ Following lawyer-theologian David VanDrunen, it will suffice to observe that "there are good reasons to think that *Genesis* 9:6 speaks more about human duties than human rights."¹³⁰ Human rights and the human duty of correction or rectification of violations of rights are linked by the teaching of human beings as the image of God: "God appeals [in *Genesis* 9:6] to the image of God not to explain why murder deserves a severe penalty but to explain why the penalty will be administered 'by man.'¹³¹ Drawing on Kline's judicial-enrobing analysis,¹³² VanDrunen concludes that "the appeal to the image in

125. KLINE, *supra* note 116, at 103.

126. See C. Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 MCGEORGE L. REV. 723, 745-46 (2009) (accounting for the appropriateness of state-enforced remedies for breaches of contract in terms of the Christian doctrine of sin).

127. See *infra* text accompanying notes 128-32.

128. See *supra* note 88.

129. See CLAUS WESTERMANN, *GENESIS 1-11: A COMMENTARY* 467 (John J. Scullion trans., 1984) ("The variations in the interpretation of the verse are striking."). For examples of varied interpretations see *id.* at 466-69 and VICTOR P. HAMILTON, *THE BOOK, OF GENESIS CHAPTERS 1-17* 315 (1990).

130. David VanDrunen, *Natural Law in Noahic Accent: A Covenantal Conception of Natural Law Drawn from Genesis 9*, 30 J. SOC. CHRISTIAN ETHICS 131, 138 (2010).

131. *Id.*

132. See *supra* text accompanying notes 118-23.

Genesis 9:6 ought to be read as an appeal to the reality of this royal-judicial commission. . . . When justice is violated, human beings should exercise their judicial authority to remedy the situation."¹³³ While not as central in the Christian tradition as the account of humanity's creation in the image of God, VanDrunen's analysis of this remedial text warrants Evangelical support for the use of state action to rectify violations of human rights.

Kline also saw a positive, ameliorative role for civil government. In other words, the inherent worth of humans requires the state to remediate as well as adjudicate, to enhance as well as defend, the covenantally grounded rights of its citizens:

[A]s an administrative community it [the state] becomes a welfare agency burdened with the relief of those destitute by reason of the cursing of the ground and the general frustration of man's cultural efforts under the common curse, all aggravated by the selfishness of men themselves competing in an economy tending to disequilibrium.¹³⁴

There is thus a basis in the standard Christian teaching of creation of humanity in the image of God for recognition of negative rights (such as the Declaration's trilogy of life, liberty, and pursuit of happiness) as well as positive claim rights. It is doubtful that this supports state action to implement Nussbaum's capabilities approach *tout court*; yet, such a full-orbed view of the doctrine of the image of God warrants discussion of the positive as well as the corrective role of civil government.

Grounding human dignity in the teaching of the image of God as embedded in a covenantal relationship between God and human beings resolves the challenge to Martha Nussbaum.¹³⁵ As ethicist Gilbert Meilaender argues, notwithstanding that some humans—the quartet of the profoundly mentally handicapped, those in a persistent vegetative state, and those suffering late-term dementia—may lack human capabilities, which reduces their *individual* dignity, there is no effect on their *personal* dignity.¹³⁶ The fundamental covenantal relationship with God persists regardless of the presence or absence of a person's capabilities. Bearing the image of God is a permanent status, not a variable state or condition.

On Kline's understanding, Evangelicals have a theological as well as exegetical basis on which to affirm the non-instrumental worth of all

133. VanDrunen, *supra* note 130, at 138.

134. *Id.*

135. See *supra* text accompanying notes 101–109.

136. MEILAENDER, *supra* note 2, at 7–8.

human beings: They were created in the image of God and that image remains regardless of the subsequent presence of sin.¹³⁷ Locating human dignity in the covenantal-structural image of God rather than in God's putative universal and permanent love has the virtue of accounting for the biblical texts describing God's particular and permanent wrath.¹³⁸ Moreover, the form of covenant described in the Hebrew Scriptures encompasses elements of stipulations and the related blessings and curses.¹³⁹ Justice is inherently part of a covenantal understanding of the image of God.¹⁴⁰ In other words, not only are human beings wronged when another agent acts out of accord with the worth of the aggrieved person, the other deserves a response fitted to the wrong. Drawing from the account of the Noahic covenant, the Christian doctrine of humanity's creation in the image of God accounts both for moral, primary rights and also secondary rights of correction and rectification. And vindication of at least some of these secondary rights is appropriately reserved to state action.

137. See *supra* text accompanying notes 129–34.

138. See, e.g., *John* 3:36 (“Whoever believes in the Son has eternal life; whoever does not obey the Son shall not see life, but the wrath of God remains on him.”); *Matthew* 25:41–46; *Mark* 9:42–48 (quoting Jesus on two occasions describing a place of eternal torment); see also *Romans* 2:6–10; *Revelation* 20:11–15.

139. See, e.g., *Genesis* 2:16–17 (“And the LORD God commanded the man, saying, ‘You may surely eat of every tree of the garden, but of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall surely die.’”); see KLINE, KINGDOM PROLOGUE, *supra* note 116, at 12 (“Conspicuous among the stipulated terms of the original divine-human relationship were the paired sanctions of life and death, the curse of death threatened against any breach of fealty and the blessing of life promised for loyal obedience. Now divine sanctioning is an essential element in covenants”). See generally MEREDITH G. KLINE, THE STRUCTURE OF BIBLICAL AUTHORITY (1989); see also *Leviticus* 26; *Deuteronomy* 28.

140. This observation provides theological support for Wolterstorff's objection to the divine command theory of rights. See WOLTERSTORFF, *supra* note 77, at 271–81. As Wolterstorff correctly observes:

[P]resupposed by the biblical presentation of God as *issuing commands* to us, thereby generating in us the moral obligation to obey . . . is the standing moral obligation on our part to obey such commands . . . and the standing general moral right on God's part to our obeying such commands And presupposed by the biblical presentation of God as *making promises* to us, thereby generating in himself the moral obligation to keep God's promise . . . is the standing moral obligation on God's part to keep such promises . . . and the standing general moral right on our part to God's keeping such promises.

Id. at 283. Standing moral obligations and moral rights inhere in the covenantal structure and thus in relationship between God and those who reflect God's image.

The extent of appropriate state authority to rectify wrongs is nearly as controversial as the question of the nature and scope of human rights themselves. Consensus on the scope of state authority to ameliorate the effects of sin is even less likely. Focusing only on correction, however, few would argue that the state has no place in a scheme for rectification of wrongs. Yet among those who take seriously the doctrine of the image of God there is ground for concern about assigning to the modern state virtually plenary power to remedy all wrongs. While there may be a presumption that violations of human rights correlate with state-authorized rectification, it is also the case that, as some non-Western writers have noted, state-centric rectification of wrongs undermines the place of intermediate institutions. Atrophy of intermediate institutions means that in fact there are no remedies for many violations of human rights because of the lack of state power “on the ground” in many parts of the world.¹⁴¹

Identifying rights and the jural sphere as the exclusive locus of human relationships, moreover, cannot fully account for certain relationships such as marriage and family;¹⁴² rights-talk alone cannot explain the long-standing and “given” nature of such intimate relationships. Similarly, focusing only on the jural aspect of human relationships can crowd out other important virtues such as honor, courage, friendship, and loyalty.¹⁴³

141. See RICHARD AMOAKO BAAH, *HUMAN RIGHTS IN AFRICA: THE CONFLICT OF IMPLEMENTATION* 90 (2000) (“Implementation of human rights in traditional societies without the corresponding structural change across the board, actually defeats the goal of human rights, as the social order that accorded any level of minimal protection based on the society’s dynamics of human dignity are destroyed without a new order to replace it.”); see also Onazi, *supra* note 57, at 1 (discussing need for “deep ethnographic engagement” with the lives of “ordinary peoples” to be able to “understand accurately why human rights in general have remained elusive to millions across the globe”). Nussbaum acknowledges this problem, see NUSSBAUM, *supra* note 1, at 25 (“Nations sometimes have attractive conceptions on paper, without delivering opportunities to their people in the sense of capability . . .”) but fails to credit the power of intermediate institutions to address it.

142. MEILAENDER, *supra* note 2, at 26 (“[T]he language of rights cannot account fully for the family’s importance in human life. A father’s rights have not necessarily been violated if he is unable to feed his children. Nonetheless, his human dignity is diminished.”).

143. See THOMAS K. JOHNSON, *HUMAN RIGHTS: A CHRISTIAN PRIMER* 22–24 (2008) (discussing distinction among justice and mercy as well the place of other sometimes underappreciated virtues in the human rights movement).

CONCLUSION

The Christian doctrine of humanity's creation in the image of God provides a foundation for human dignity. Dignity, in turn, is one element necessary for accounting for human rights. Violations of rights are wrongs and the same doctrine accounts for rights of rectification. There are four reasons why this accounting for human rights is important. First, notwithstanding the widespread skepticism about foundations in ethics, there are, if the Christian account is true, foundations for moral claims. That many reject the veracity of the Christian account can hardly be taken as proof of its falsehood or that those who follow the Christian tradition should be excluded from discussing the idea of human rights or participating in (or criticizing) the human rights movement.¹⁴⁴ In any event, a Christian account for human rights grounds them in a religious tradition whose narrative arc is far longer than modern secularism.

Next, this account for human dignity—even if rejected by many—provides a starting point for a multi-party dialogue in which there can be hope that other traditions will increase their efforts to provide an account for human rights. Rather than specifying more and more human rights whose promulgation will prove to be an empty letter, the human rights movement would be better served by seeking to identify which claims are truly human rights and which are simply goods. “A new critical grounding for human rights is required if the entire tradition is not to explode into scores of conflicting subjective wants that have no real authority and, in reality can never be implemented.”¹⁴⁵ This Author hopes this piece spurs others, whether from modern secular or long-standing religious traditions, to deeper engagement on their part.

Third, finding a foundation for human rights in the image of God maintains continuity with the best of the Enlightenment tradition, a conclusion Martha Nussbaum acknowledges.¹⁴⁶ The Declaration's reference to “Nature and Nature's God” was not a throwaway tag line.¹⁴⁷

144. See MEILAENDER, *supra* note 2, at 97 (“It is not religious believers who should be mute in a public square committed to equal dignity; it is others who find themselves mute when asked to give an account of our shared public commitment.”).

145. Browning, *supra* note 67, at 173.

146. See Nussbaum, *supra* note 1, at 41 (“[O]ne attractive and enduring marriage [among the thinkers whose ideas shaped the Founding], compatible with Christian beliefs, was a combination of the Stoic idea of the equal worth of all human beings with the Aristotelian idea of human vulnerability.”).

147. Nor were the recitals in the *Statute of Virginia for Religious Freedom*, VA. CODE ANN. § 57.1 (Michie 2007) (1786) (“Whereas almighty God hath created the mind

While by the Founding era the Enlightenment tradition had moved from the earlier historical, metaphysical, and theological foundations for the moral order, it continued to assert the existence of inherent human rights, which, in turn, presupposed divinely-ordained human ends or purposes the attaining of which entailed the freedom to exercise such rights.¹⁴⁸ In addition, a full-orbed grounding of the human person as an image of God justifies not only the negative rights associated with the Declaration's trilogy of life, liberty, and the pursuit of happiness but also provides a foundation for positive human rights. The provisions of the Noahic covenant go on to supply a biblical justification for State-level rectification of violations of both sorts of human rights.

Finally, for the Evangelicals whose concerns were noted at the outset, this Article can provide a theologically grounded starting point from which to support and critique the contemporary human rights movement. Many Evangelicals have jumped on the human rights bandwagon. Others have reacted against some particular expression of human rights with little substantive consideration. In either case, their contributions have been primarily political or rhetorical; relatively few Evangelicals have had a meaningful role in the analysis and critique of the idea of human rights.¹⁴⁹ This Author also hopes this piece spurs deeper engagement on their part.

free . . ."). See also James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 8 THE PAPERS OF JAMES MADISON 295, 298-301 (Robert A. Rutland et al. eds., 1973) (1785) ("[W]e hold it for a fundamental and undeniable truth, that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.").

148. See Stern & Jones, *supra* note 91.

149. For a recent example to the contrary see Gordon Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. RICH. L. REV. 1255 (2009).