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The Institute for Christian Legal Studies (ICLS),
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Legal Society.

The Mission of ICLS is to train and encourage Christian law students, law professors, pre-law advisors, and practicing lawyers to seek and study biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

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The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer's work, and legal institutions is central to a lawyer's calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God, as well as the practical implications of the Christian faith for their daily work. The *Journal* exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The *Journal* seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work, and, second, to provide legal scholars a peer-reviewed medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across the ages.

Given the depth and sophistication of so much of the best Christian legal scholarship today, the *Journal* recognizes that sometimes these two purposes will be at odds. While the *Journal of Christian Legal Thought* will maintain a relatively consistent point of contact with the concerns of practitioners, it will also seek to engage intra-scholarly debates, welcome inter-disciplinary scholarship, and encourage innovative scholarly theological debate. The *Journal* seeks to be a forum where complex issues may be discussed and debated.

EDITORIAL POLICY

The *Journal* seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's work. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of the Institute for Christian Legal Studies, Christian Legal Society, Trinity Law School, or other sponsoring institutions or individuals.

To submit articles or suggestions for the *Journal*, send a query or suggestion to Mike Schutt at mschutt@clsnet.org.



HUMAN > RIGHTS

BY ANDREW R. DELOACH

On May 30, 2019, the US State Department announced the creation of a new Commission on Unalienable Rights, tasked with providing “fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles of natural law and natural rights.”¹ The immediate response from human rights activists was skepticism, if not outright indignation, at the perceived attempt to restrict rights, particularly for immigrants, women, and LGBT people. Since the announcement, a throng of advocates, journalists, lawmakers, and “faith-based organizations” has called for the abolition of the new Commission.² Before the Commission had even taken shape or action, it had been decried and denounced for the mere threat that it may, by whatever authority, take away precious rights. But there has been utter silence on the issue of the *subjects* of those rights: human beings. In keeping with an undeniable trend in the US as well as internationally, the insatiable appetite for ever more rights has eclipsed our focus on the human person.

In fact, our culture is acutely focused on unmaking traditional—especially religious—notions of the human person. It is an anthropological crisis aimed at radical individualism. So it is no surprise that human rights (in discourse, practice, and advocacy) has lost sight of the human as well. One need only scan the titles of recent books in the field to discover where the attention lies: *Making Human Rights Work*; *Mobilizing for Human Rights*; *Speaking Rights to Power: Constructing Political Will*; *The New Human Rights Movement: Reinventing the Economy to End Oppression*; *The Right to Have Rights*; *The Future of Human Rights*. To be fair, this is not a matter of exclusion but emphasis, but in that regard the political and pragmatic are what count. Unfortunately, this

has resulted in a significant neglect of consideration for human beings—in particular, their nature, dignity, and flourishing.

RIGHTS PROLIFERATION AND THE LOSS OF THE HUMAN

In 1948, the nations of the world declared together that the inherent dignity and equal and inalienable rights of all members of the human family provide the foundation of freedom, justice, peace, and human rights.³ Yet these nations have since been unable (and unwilling) to justify that foundation. Even in spite of 70 years of silence on the subject of philosophical foundations, the human person has always been, at a minimum, the definitional foundation of human rights. But the contemporary rights movement has jettisoned that proper emphasis on human beings, and instead put all energies into rights. Inhuman rights—rights that are contrary to human nature and human flourishing—are a category mistake. Rights at the expense of humans are neither humane nor right. Czeslaw Milosz, the Polish poet and Nobel Laureate, perceptively described the nature of this crisis when he reflected on “those deeply moving words...which pertain to the old repertory of the rights of man and the dignity of the person.... But how long can they stay afloat if the bottom is taken out?”⁴ Similarly, we may even now recall David’s temptation to despair: “if the foundations are destroyed, what can the righteous do?” (Psalm 11:3).

When the human rights movement (and Western society more broadly) does consider the human, it all too frequently devolves into mere solipsism, an inordinate fixation on individual desire. Where Augustine

¹ Nahal Toosi, *State Department to launch new human rights panel stressing “natural law”*, POLITICO (MAY 30, 2019), <https://www.politico.com/story/2019/05/30/human-rights-state-department-1348014>.

² Aysha Kahn, *Faith groups urge State Department to abolish new ‘unalienable rights’ commission*, RELIGION NEWS SERVICE (JULY 24, 2019), <https://religionnews.com/2019/07/24/faith-groups-urge-state-department-to-abolish-new-unalienable-rights-commission/>. THE LIST OF “FAITH GROUPS” IS REVEALING: THE PRESBYTERIAN CHURCH (USA), AMERICAN JEWISH WORLD SERVICE, RECONSTRUCTING JUDAISM, THE ANTI-DEFAMATION LEAGUE, THE NATIONAL COUNCIL OF CHURCHES, MUSLIMS FOR PROGRESSIVE VALUES, AND MORE.

³ G.A. Res. 217 (III) A, pmbl., Universal Declaration of Human Rights (Dec. 10, 1948).

⁴ Czeslaw Milosz, *The Religious Imagination at 2000* 32, NEW PERSPECTIVES QUARTERLY (FALL 1997).

confesses to God, “our hearts are restless till they find their rest in thee,” our postmodern neighbor whines to anyone, “My heart is restless until it rests...in me.” The consequences of this thinking are disastrous for the protection of human beings. As David Hirsch warns, “[p]urveyors of postmodern ideologies must consider whether it is possible to diminish human beings in theory, without, at the same time, making individual human lives worthless in the real world.”⁵ Examples of the seeming worthlessness of human lives under domestic and international law are sadly not difficult to call to mind.

The loss of the human in human rights has resulted in not only an unwarranted emphasis on rights, but also an environment of substantial rights proliferation. “Today there are calls to make everything from access to the Internet to development aid to free university education a right.”⁶ In his 2019 Reith Lecture, Jonathan Sumption, former justice of the UK Supreme Court, perfectly illustrated this phenomenon in the work of the European Court of Human Rights in Strasbourg, France. Article 8 of the European Convention on Human Rights protects the human right to private and family life, which initially meant the privacy of the home and one’s personal correspondence. But the Court has created a principle of personal autonomy, by which it has continually fashioned and expanded Article 8 to cover nearly anything that interferes with a person’s autonomy. As Sumption explains:

This may be illustrated by the vast range of issues which the Strasbourg Court has held to be covered by Article 8. They include the legal status of illegitimate children, immigration and

deportation, extradition, criminal sentencing, the recording of crime, abortion, artificial insemination, homosexuality and same-sex unions, child abduction, the policing of public demonstrations, employment and social security rights, environmental and planning law, noise abatement, eviction for non-payment of rent and a great deal else besides. All of these things have been held to be encompassed in the protection of private and family life. None of them is to be found in the language of the convention. None of them is a natural implication from its terms. None of them has been agreed by the signatory states.⁷

Far from being passive observers to rights proliferation, many in the human rights movement are leading the charge.⁸ There is no more stark or deliberate example of this than the brazen push by UN treaty-monitoring bodies to coerce states into changing their domestic law to permit a right to abortion.⁹ There is no right to abortion anywhere in international law; it does not exist in any treaty. To the contrary, the protection of the right to life of the unborn is on much firmer ground, finding expression in various regional and international human rights treaties.¹⁰ For this reason, the “experts” directing these UN treaty bodies have adopted a back-door approach to inventing a right to abortion: willfully exceeding their mandate and authority, they order individual nations to change their domestic law and adopt the right to abortion; when enough states have complied (whether they wanted

⁵ DAVID H. HIRSCH, *THE DECONSTRUCTION OF LITERATURE: CRITICISM AFTER AUSCHWITZ* 165 (BROWN UNIV. PRESS 1991).

⁶ Mary Ann Glendon and Seth D. Kaplan, *Renewing Human Rights*, FIRST THINGS (FEBRUARY 2019), <https://www.firstthings.com/article/2019/02/renewing-human-rights#print>.

⁷ *The Reith Lectures: Jonathan Sumption, Human Rights and Wrongs*, BBC Radio4 (June 8, 2019), <https://www.bbc.co.uk/programmes/m0005msd>.

⁸ Glendon and Kaplan, *supra* note 6.

⁹ See, e.g., *Ireland Pressured by the HRC to Expand Access to Abortion*, PARLIAMENTARY NETWORK FOR CRITICAL ISSUES (JULY 15, 2014), <http://www.pncius.org/update.aspx?id=114>; STEFANO GENNARINI, *UN COMMITTEE SAYS, “RIGHT TO LIFE” MEANS “RIGHT TO ABORTION”*, C-FAM (NOV. 8, 2018), https://c-fam.org/friday_fax/un-committee-says-right-life-means-right-abortion/; JULIAN BONNICI, *UN’S CHILDREN’S RIGHTS COMMITTEE CALLS ON MALTA TO DECRIMINALISE ABORTION AND ENSURE ITS SAFE ACCESS IN THE COUNTRY*, LOVIN MALTA (JUNE 10, 2019), <https://lovinmalta.com/news/news-politics/uns-childrens-rights-committee-calls-on-malta-to-decriminalise-abortion-and-ensure-its-safe-access-in-the-country/>. SEE ALSO ANDREA STEVENS, *PUSHING A RIGHT TO ABORTION THROUGH THE BACK DOOR: THE NEED FOR INTEGRITY IN THE U.N. TREATY MONITORING SYSTEM, AND PERHAPS A TREATY AMENDMENT*, 6 PENN. ST. J.L. & INT’L AFF. 71 (2018); KELSEY ZORZI, *THE IMPACT OF THE UNITED NATIONS ON NATIONAL ABORTION LAWS*, 65 CATH. U. L. REV. 409 (2016).

¹⁰ See, e.g., Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; United Nations Convention on the Rights of the Child pmbL, Nov. 20, 1989, 1577 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 6 ¶ 5, Dec. 19, 1966, 999 U.N.T.S. 171.

to or not), the UN and global abortion advocates can claim that a right to abortion exists in customary international law, that is, law made by consistent state practice rather than by a negotiated treaty based on consensus. Opposition to this technique has been met with astounding hostility.¹¹

Thus, we are in a moment of crisis: “[w]here everyone has a right to everything, there can be no justice. Rights-claims cannot proliferate indefinitely without at some point becoming self-negating.”¹² When rights claims consistently proliferate, they will inevitably impede and contradict each other. Worse, the human person whom the rights are meant to protect is diminished and suffers under the surfeit of expanding rights. Indeed, one of the framers of modern human rights law, Charles Malik (a Lebanese Christian and member of the drafting committee for the Universal Declaration), framed the problem this way: “Unless man’s proper nature, unless his mind and spirit are brought out, set apart, protected and promoted, the struggle for human rights is a sham and a mockery.”¹³

THE CHRISTIAN RESPONSE

Is the situation beyond repair? Is it so bad that we are forced to concede (paraphrasing Anthony Esolen), “The worst thing about the human rights movement is everything it does and everything it doesn’t do”? I believe it is neither irreparable nor as lamentable as that. But many

Christians seem to think otherwise, and it is not hard to understand why. We cannot help but observe the growing catalogue of rights, “some of which contradict each other and many of which, detached from any reference to human goods, are simply unacceptable from the Christian perspective.”¹⁴ So what is the solution?

The one proposed by this issue of the *Journal* is not to retreat from or ignore human rights, but to engage and reorient the proper focus of human rights from a robust

Christian perspective. Human rights existed well before the Enlightenment and the modern revolutions that gave us the current language of individual rights.¹⁵ The philosophical grounds for human rights advocacy—especially the notion that all human beings are created by God with equal dignity—had unique roots in Christianity in the fourth through sixth centuries.¹⁶

Despite this historical bedrock, many Christians (and many others of various backgrounds)

frequently criticize the human rights project and encourage its abandonment altogether. Their criticisms often perform a salutary service by “curb[ing] the modern appetite for the limitless expansion and even monopolization of human rights....”¹⁷ But the criticisms fail to justify abandonment, and instead “support the proposition that the religious sources and dimensions of human rights need to be more robustly engaged and extended.”¹⁸ Rather than discard human rights—and with it, a key platform for professing the biblical understanding of human nature and natural law—we can confidently proclaim their foundations and

When rights claims consistently proliferate, they will inevitably impede and contradict each other. Worse, the human person whom the rights are meant to protect is diminished and suffers under the surfeit of expanding rights.

¹¹ *F&L Defence of Unborn “Breathtakingly Arrogant”—UN Committee Chairman*, RATHKENNYPARISH.IE (JULY 15, 2014), <http://www.rathkennyparish.ie/todays-mass-readings/2024>.

¹² Peter C. Meyers, *When Exactly Did the Idea of Rights Go Off the Rails?* LAW & LIBERTY (JULY 5, 2019), <https://www.lawliberty.org/2019/07/05/when-exactly-did-the-idea-of-rights-go-off-the-rails/>.

¹³ THE CHALLENGE OF HUMAN RIGHTS: CHARLES MALIK AND THE UNIVERSAL DECLARATION 4 (HABIB C. MALIK ED., CHARLES MALIK FOUNDATION 2000).

¹⁴ Thomas D. Williams, WHO IS MY NEIGHBOR? PERSONALISM AND THE FOUNDATION OF HUMAN RIGHTS xv (CATHOLIC UNIV. OF AMERICA PRESS 2005).

¹⁵ John Witte, *Introduction to CHRISTIAN AND HUMAN RIGHTS: AN INTRODUCTION* 39-40 (JOHN WITTE, JR. AND FRANK S. ALEXANDER EDS., CAMBRIDGE UNIV. PRESS REPR. ED. 2012).

¹⁶ Justin Taylor, *The Christian Roots of Human Rights*, THE GOSPEL COALITION (AUG. 1, 2016), <https://www.thegospelcoalition.org/blogs/evangelical-history/the-christian-roots-of-human-rights/>.

¹⁷ Witte, *supra* note 15, at 40.

¹⁸ *Id.* at 40-41.

importance. We can, and should, ask why people ought to be treated in a certain way, and what makes the human person worthy of certain things like rights.¹⁹ Likewise, “[w]e should abandon these ancient principles and practices only with trepidation, only with explanation, only with articulation of viable alternatives.”²⁰

Thus, our proper response is not to deny and dismiss, but to engage, affirm, and build the proper understanding of human rights. And we do have allies. Antônio Trindade, Judge on the UN International Court of Justice in The Hague, regularly argues that international law (*jus gentium*) is based on the “universal legal conscience” of humanity and is “responsible for the progress of the human species not only legally, but also spiritually.”²¹ The entire corpus of international human rights law “has been constructed around superior interests of the human person” and thus, our priority must be to “strengthen the legal standing of the human being claiming rights”²²—that is, to prioritize humans over rights.

We must not be overly optimistic about the capacity of our legal systems (domestic, regional, or international) to protect human beings. The best way to ensure their protection in law is not by creating a more active and mobilized system of legal protections

(i.e., by adding more rights), but by proclaiming and defending a robust understanding of the human person. And here, the Christian is on solid ground.

IMAGO DEI, HUMAN DIGNITY, AND LOVE OF NEIGHBOR

Human beings are the center of God’s creation and nature; “all things were created on behalf of man.”²³ Our creation in the image of God “forms the deep ontological foundation of a Christian theory of human dignity, human worth, and human rights.”²⁴ Dignity (despite its notorious ambiguity) here refers to the inherent worth of the person, who is someone, not something.²⁵ “Human dignity has no biological ‘reason,’ but having dignity does come with biological membership in the family” of human beings.²⁶ Our dignity is found in our having been created, that is, on our dependence on God and in our *unnecessary* creation. We have

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we have willed, evolved,
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dignity not because we have willed, evolved, or merited it, but because God has graciously chosen to confer it upon us, when he did not need to do so.²⁷ It follows that human dignity is transcendental. “For one reason and one reason only human beings possess what we call ‘dignity,’ because as moral beings they represent the Absolute.”²⁸

The invaluable consequence of this firm foundation is a proper grounding of human rights. Human dignity does

¹⁹ Williams, *supra* note 14.

²⁰ Witte, *supra* note 15, at 41. Christian calls for abandonment bring to mind a wonderfully Chestertonian response: “The more modern type of reformer goes gaily up to [a fence or gate erected across a road] and says, ‘I don’t see the use of this; let us clear it away.’ To which the more intelligent type of reformer will do well to answer: ‘If you don’t see the use of it, I certainly won’t let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it.’” G.K. CHESTERTON, *THE DRIFT FROM DOMESTICITY* (1929), REPRINTED IN *IN DEFENSE OF SANITY: THE BEST ESSAYS OF G.K. CHESTERTON* 173 (DALE AHLQUIST ED., IGNATIUS PRESS 2011).

²¹ Johannes van Aggelen, *Developing a Universal Juridical Conscience: Trindade Offers a Viable Agenda for the 21st Century*, 37 CASE W. RES. J. INT’L L. 41, 46-47 (2005), QUOTING ANTÔNIO AUGUSTO CANÇADO TRINDADE, 3 TRATADO DE DIREITO INTERNACIONAL DOS DIREITOS HUMANOS (SERGIO ANTONIO FABRIS ED., 2003).

²² *Id.*

²³ Johann Gerhard, *Loci Theologici IV, Locus 9*, in *THE DOCTRINE OF MAN IN THE WRITINGS OF MARTIN CHEMNITZ AND JOHANN GERHARD* 29 (HERMAN A. PREUS AND EDMUND SMITS EDS., COLACCI, SATRE, PREUS, STAHLKE, AND NARVESON TRANS., CONCORDIA PUB. HOUSE 2005).

²⁴ Witte, *supra* note 15, at 15.

²⁵ See Williams, *supra* note 14, at 118.

²⁶ ROBERT SPAEMANN, *LOVE & THE DIGNITY OF HUMAN LIFE: ON NATURE AND NATURAL LAW* 28 (WM. B. EERDMANS PUB. CO. 2012).

²⁷ See JEFFREY A. BRAUCH, *FLAWED PERFECTION: WHAT IT MEANS TO BE HUMAN & WHY IT MATTERS FOR CULTURE, POLITICS, AND LAW* 25 (LEXHAM PRESS 2017).

²⁸ Spaemann, *supra* note 26, at 44.

not describe human rights, but is the very basis of human rights. Because all human beings have been created by God with inherent worth (dignity), no one may decide whether or not another human being has human rights. “Human rights depend on the fact that no one is authorized to define the circle of those who are entitled to them and those who aren’t.”²⁹ Human dignity and human rights are beyond bargain, non-negotiable. It is by possession of this dignity that we can talk about human rights in the first place, “for only on this condition does it lie beyond the discretion of some human beings to ascribe or deny human rights to others.”³⁰

Christians would likewise do well to think and speak more deeply about the human person. Indeed, rights theory ultimately stands or falls with its understanding and treatment of the human person.³¹ Rights ought not depend “on an individualistic notion of man but rather on his essentially relational and transcendent character.”³² More specifically, we should distinguish between an individual as “a single unit in a homogenous set, interchangeable with any other member of the set,” and a person, who is unique and irreplaceable—unrepeatable.³³ The human person is properly located at the center of our rights discourse when we consider what is unique to each person as well as common to the human condition.³⁴ John Finnis summarizes this idea nicely by explaining that human dignity and equality are based on the fact that “each living being possesses, actually and not merely potentially, the radical capacity to reason, laugh, love, repent, and choose” as a unique person.³⁵

This clearly calls us to affirm human dignity, but we need not simultaneously affirm “expressive individualism.”³⁶ In fact, proliferation of the sort of inhuman rights described above relies on our tacit support (i.e., our silence) in the face of such aggressive individualism. But to respect one’s human dignity “does not mean to respect his particular inclinations as an expression of his dignity.”³⁷

Ultimately, the proper understanding of human nature, and the consequent treatment of each person in his human rights, depends on love of neighbor. Human rights are not simply about individual rights claims, but rather “what we have a duty to give to, or protect in, others. Rights thus become an obligation of justice and mercy, a ‘means’ in pursuit of the common good, a matter not just of strict justice, but also friendship.”³⁸ This properly orients our human rights discourse and advocacy around the most effective protection of the dignity of the human person—not simply “the minimal conditions necessary for that dignity” (i.e., the right to have rights; economic welfare; etc.) but the conditions within which virtue and human flourishing can be nourished.³⁹ Love of neighbor is eminently relevant to a proper understanding of human rights; it is “an ambition to ensure the true good of another person”—that is, the good (worth) of that person as well as the particular goods that person needs.⁴⁰ Spaemann frames this ambition beautifully: “Each human being is an *imago Dei*, and the one who offers his life for him never does something meaningless in doing so.”⁴¹

²⁹ ROBERT SPAEMANN, *ESSAYS IN ANTHROPOLOGY: VARIATIONS ON A THEME 22* (GUIDO DE GRAAFF AND JAMES MUMFORD TRANS., CASCADE BOOKS 2010).

³⁰ *Id.* at 93.

³¹ Williams, *supra* note 14, at 105.

³² *Id.*

³³ *Id.* at 129.

³⁴ ETHNA REGAN, *THEOLOGY AND THE BOUNDARY DISCOURSE OF HUMAN RIGHTS 31* (GEORGETOWN UNIV. PRESS 2010).

³⁵ John Finnis, *Abortion, Natural Law, and Public Reason*, in *NATURAL LAW AND PUBLIC REASON 91* (ROBERT P. GEORGE AND CHRISTOPHER WOLFE EDs., GEORGETOWN UNIV. PRESS 2000).

³⁶ “The idea that we are all made in the image of God is vital to Christian ethics, especially in connection to the unborn, the vulnerable, and the infirm. This should...lead us to reflect on how we might affirm such universal dignity without the problems of expressive individualism.” Carl R. Trueman, *Blessing When Cursed*, *FIRST THINGS* (JUNE 14, 2019), <https://www.firstthings.com/web-exclusives/2019/06/blessing-when-cursed>.

³⁷ Spaemann, *supra* note 26, at 36.

³⁸ Regan, *supra* note 34, at 15.

³⁹ *Id.* Likewise, as understood in the *Universal Declaration and all human rights treaties*, “a right is a human right if the fundamental rationale for establishing and protecting the right is that conduct that violates the right violates the ‘act towards all human beings in a spirit of brotherhood’ imperative” laid out in the *Universal Declaration itself*. MICHAEL J. PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES 28* (CAMBRIDGE UNIV. PRESS 2013).

⁴⁰ Karol Wojtyła, *LOVE AND RESPONSIBILITY 272* (H.T. WILLETTs TRANS., IGNATIUS PRESS REPR. ED. 1993) (1960).

⁴¹ Spaemann, *supra* note 26, at 18.

That model ought to guide Christian thinking about human rights. This issue of the *Journal* seeks to expound that model and therefore approaches key issues in human rights from a thoroughly Christian perspective. You will not find any unified “Christian theory of human rights,” but rather a general examination—from lawyers, academics, and advocates—at how the Christian worldview influences and encourages our attention to human rights. Elyssa Koren and Paul Coleman, both international lawyers, argue for the continued relevance of the Universal Declaration as the definitive benchmark for protecting fundamental human rights—and countering the call for false rights. Angus Menuge trains a philosopher’s careful eye on the modern and postmodern philosophies that attempt to support those false rights, and argues the case that Christian theism provides the more compelling and legitimate foundation for human rights. Similarly, Grégor Puppincq presents an in-depth analysis of two competing theories of human nature and human dignity, highlighting the danger to human beings in a theory of “disembodied dignity.” Offering an advocate’s practical perspective, Ewelina Ochab details the issue of global persecution based on religion or belief—particularly affecting religious minorities—and considers appropriate responses to atrocities. Finally, Barry Bussey builds the case for respecting the personal and moral opinions of judges and protecting the judicial conscience.

We must keep the emphasis of human rights on human beings. I am hopeful that this issue will provide needed encouragement and resources “to rescue the substance of the human”⁴² as the foundation for human rights.

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⁴² Jürgen Habermas, quoted in Michael Reder and Josef Schmidt, SJ, *Habermas and Religion*, in JÜRGEN HABERMAS ET AL., AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE 5 (WILEY 2010).

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THE UNIVERSAL DECLARATION AND THE DISTORTION OF HUMAN RIGHTS

BY ELYSSA KOREN AND PAUL COLEMAN

Three years ago, in one of the many drab, windowless negotiation rooms of the United Nations Human Rights Council in Geneva, delegates were negotiating a resolution on the protection of the family. The room was divided along familiar lines—African and other developing nations supported the resolution, and the cohort of Western secular nations were outraged with the text.

At one point, a Western delegate took the microphone and demanded to know where the contentious language on the family had come from. She wanted to know how delegates could talk of the family as being the “natural and fundamental group unit of society,” and warned the room that her delegation could not possibly accept such terms. The African chair of the negotiation gently pointed out that the language was taken verbatim from the Universal Declaration of Human Rights. At this point, the visibly embarrassed delegate retreated, and a few chuckles broke out around the room. This short episode was not only amusing, but also illustrative.

The Declaration was unanimously adopted in 1948 by the new UN General Assembly, consisting of fifty-eight countries of global geographic representation. The Declaration’s drafters appealed to the common intuition that every person, regardless of circumstances, challenges, privileges, or merits, has an inherent value, equal to that of all other persons. Respect for dignity became the keystone of all human rights.

All philosophical agreement, however, ended here. This lack of robust philosophical underpinnings has allowed anything and everything to attain the status of “human right” when couched in the language of dignity. Real human rights remain in a state of desperate neglect, and the complex human rights system born from the Declaration looks tired and toothless.

If the root of today’s human rights crisis can be traced back to the origins of the Declaration, so too can a possible solution. Although unanswered questions have resulted in a crisis of legitimacy, a return to the original understanding of the Declaration may still be able to reorient the work of human rights toward the true common good.

AGREEMENT WITHOUT FOUNDATION

Regardless of one’s political or spiritual affinities, the Declaration can be a challenging read for anyone with a strong set of beliefs. This is because it follows no one paradigm, abides by no single faith, and attempts unity among wildly disparate groups. By applying to everyone, it runs the risk of appealing to no one.

While many have criticized the Declaration for various reasons, conservatives are perhaps most vocal in their criticism today. With its layers of ambiguity and fluid anti-discrimination language, it is easy to see why the Declaration has been successfully captured by progressive forces to serve as the preeminent reference for controversial agendas that run contrary to the moral beliefs of many.

The Declaration attempts a universalist worldview that addresses the most important human rights questions of our time by, in large part, avoiding the underlying foundations to the answers. Herein lies both the main problem and the primary value of the Declaration. Why do we have human rights? From where do these rights come? What constitutes a fundamental human right? Such questions are tied to the very core of our existence and what it means to be human.

For religious believers, the source of our dignity lies squarely in the divine. Without a unifying religious vantage, however, it is hard to agree on a firm philosophical rationale for human rights.

Well aware of the difficulty of arriving at common ground on a deep existential level, the international architects of the Declaration chose to focus on matters of practical importance—namely, the urgency of avoiding the kind of cataclysmic large-scale war from which the world had just emerged. They therefore secured its foundations on a more tenuous, but workable, base comprising nothing more than a shared respect for human dignity. And so the Declaration commences by stating that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of

freedom, justice and peace in the world.” This would have to suffice, absent anything more profound on which they could agree.

THE HIJACKING OF HUMAN RIGHTS

The lack of something more substantial to explain our inherent dignity has allowed for the many manipulations of the human rights framework that we see today. The dignity solution has resulted in a human rights hijacking, which, if left unchecked, could lead to the destruction of the entire project so carefully set in motion by the Declaration. The proliferation of newly invented “rights” in the name of dignity seems inevitable without a solid footing on which to stand.

It is not surprising that much of the fight over human rights concerns our core physical and existential needs. It is the very essence of the person that is up for debate. Freedom, understood as the absence of any limitations, represents the pinnacle of our modern ambitions, and anything that stands in the way is branded as an illegitimate shackling of the person and denial of human rights. “Sexual rights,” abortion, the elimination of parental rights, and radical sexuality education for children thus constitute the prevalent social issues in dispute at the UN today.

We can see this most clearly through the distortion of “the right to life” (Article 3). The UN Human Rights Committee recently adopted its official interpretation of what the “right to life” means. Their non-binding but highly influential interpretation supports medical practitioners’ euthanizing those who wish to “die with dignity.” It also states that countries must allow “safe access to abortion” in order to protect the right to life of women, even though international law offers nothing that implies a “right to abortion” and actually safeguards unborn life. UN human rights bodies have nevertheless pressured governments the world over to change laws on abortion, in violation of the International Conference on Population and Development (1994) Programme of Action, which states that abortion be determined at the level of national legislatures.

A similar story is unfolding with “LGBT rights.” Article 1 of the Declaration states, “All human beings are born free and equal in dignity and rights.” Although seemingly non-contentious, this statement is at the forefront of the controversial push for “LGBT rights” at the UN. Indeed, the UN’s primary multi-million-dollar LGBT campaign is entitled “Free and Equal,” with all manner of people pulled in to support this cause, including the late Mother Teresa—an ardent defender of the natural family.

A DECLARATION BUILT ON FINDING CONSENSUS

The problem we see today is that anything can be misrepresented as a fundamental human right unless we either finally arrive at a shared philosophical understanding of the world or return to the drafters’ vision of a human rights project with a consensus-led baseline of agreement that is able to garner universal agreement. Given the impossibility of the former, it is high time we resume the Declaration’s back-to-basics approach. Until then, the project will continue to unravel as preference after preference is labeled a “human right” under the guise of dignity.

We, therefore, return to the origins of the Declaration in search of answers. Its success stemmed largely from the fact that it was so desperately needed—the horrors of global war propelled forward what would otherwise have been an impossible task. Participating countries showed an indisputable willingness to make it work, resorting to basic commonalities rather than lofty ambitions in order to come to agreement. Today, the fight over controversial agendas has subsumed both the sense of urgency and the desire for consensus that drove the Declaration to completion.

The battle of political and civil rights versus economic and social rights provides a striking example of the drafters’ commitment to solving impasses. The conservative stance, championed by the United States, was that attributing the status of a right to economic and social provisions such as good housing or leisure time imposed unwarranted obligations on states and ran the risk of weakening fundamental rights. The fear was that this would allow countries to pick and choose their favorite rights to promote. The USSR and its allies saw no problem with elevating economic and social rights to the same status as civil and political rights, and they wanted to impose clear obligations on states to guarantee these rights. This marked a serious divergence that easily could have put an end to the entire project.

As a result of skillful compromise, the full gamut of rights ultimately was included, but the economic and social were preceded by an accompanying paragraph (Article 22), which assuaged conservative concerns. By stating that they were to be realized “in accordance with the organization and resources of each State,” it limited the economic and social rights in such a way so as to facilitate conservative agreement. At the same time, the rights were labeled as “indispensable” to meet the demands of the USSR. While not perfect for either side, this approach reflected the intent of the drafters to achieve mutual agreement wherever possible, ultimately resulting in the successful adoption of the Declaration.

The success of the human rights project at the international level is contingent on our ability to return to the baseline—the protection of the core rights outlined in the Declaration. Countries are free to fight out issues of moral concern in their own legislatures and courts. This is the self-determination inherent in the principle of sovereignty on which the international order is based. At the international level, however, given that we still lack a shared understanding of the ultimate answers, the principle of consensus that worked seventy years ago is still the only way forward.

THE CONTINUED RELEVANCE OF THE DECLARATION

As John Paul II observed, the greatest contribution of the Declaration is the “radical” and novel vision that disregard for human rights directly correlates with war. When human rights are violated, it “destroys the organic unity of the social order and it then affects the whole system of international relations.” This is the key contribution we must safeguard today. It is imperative that we uphold the Declaration as the definitive benchmark for international agreement on human rights. We must emphasize its actual language, while continuing to denounce illegitimate interpretations.

Despite its susceptibility to manipulation, the Declaration’s enormous contributions cannot be diminished. Its unequivocal affirmation of core rights such as freedom of religion and belief (both in private and “in community with others”) has held countries to a legal standard that previously did not exist. Although the Declaration is not a treaty, and therefore does not have teeth of its own, the international human rights instruments that flowed from it do have binding force. The Declaration can thus be credited for the many legal victories we see around the world today.

Conservatives cannot afford to abandon the institutions of power that seek to redefine human rights for the entire world. While the roar of false rights likely will not diminish, it is by standing firm in defense of fundamental freedoms that we can hope to see progress in the fight to end global human rights abuses. The temptation may be to forsake the international institutions and resist any appearance of assimilation with progressive agendas. The best solution, however, is to stay in the fight and proceed with the best and most truly universal resource at our disposal—the Declaration.

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HUMAN RIGHTS AND THEIR COUNTERFEITS

BY ANGUS J. L. MENUGE

At the 2019 meeting of the IVR World Congress in Lucerne, several participants expressed concern that the human rights movement is losing momentum. In his plenary address, John Tasioulas, Chair of Philosophy, Politics, and Law at King's College, London, argued that a major reason for this is the proliferation and trivialization of human rights claims. The driving motivations for the Universal Declaration of Human Rights (UDHR) were the Nazi atrocities, "barbarous acts which have outraged the conscience of mankind." In response, the UDHR insists that all human beings have "inherent dignity" and "equal and inalienable rights."¹ But subsequent generations in Western democracies have typically had no direct experience of these atrocities, the modernist philosophy of Naturalism has made people skeptical that all human beings have dignity (especially the unborn and the cognitively impaired), and the postmodernist philosophy of Autonomy celebrates the development of the "inner self," whose desires beg a bottomless pit of "rights" of self-actualization.² As a result, rights discourse has shifted from the UDHR's focus on the fundamental liberties due to all human beings to such tendentious claims as the "right" to abortion on demand, the "right" to redefine marriage, the "right" not to hear offensive speech, and even the "right" of a biological man claiming to be a "trans woman" to receive Brazilian waxing of the genitals.³ This confused and confusing situation has caused a crisis of credibility for human rights discourse.

This article considers how we should respond to this crisis. First, I briefly reflect on the great promise of the original understanding of universal, equal human rights enshrined in the UDHR. Then I argue that modernist Naturalism is incompatible with this understanding. Next, I maintain that postmodern Autonomy also fails as a ground for human rights, because it results in inconsistent, conflicting claims, and worse, threatens to reverse uncontroversial gains that have

already been made. Finally, I propose that it is only in Christian theism that legitimate human rights find a secure foundation.

THE PROMISE OF HUMAN RIGHTS

While avoiding any discussion of their ultimate justification, the UDHR provides a robust articulation of human rights. It asserts that a special dignity is inherent simply in being human—which makes irrelevant distinctions of race, sex, religion, or socio-economic status—and is not grounded in our physical and psychological abilities. This dignity is universal and equally shared, prohibiting any form of discrimination or unequal treatment.

The focus of the UDHR is not tribes united by shared interests but the entire "human family." This universal egalitarianism provides an "expanding circle" model that supports consistent progress in human rights protections. Discrimination on the basis of sex, race, and religion is clearly condemned (Article 2), and the expansion of equal protection to neglected groups does not require those already protected to give up their legitimate rights. Thus, allowing women to inherit property or to vote did not remove these rights from men; ending the slavery and segregation of African Americans did not withdraw any liberties from other racial groups; and allowing religious groups freedom of conscience and the ability to live out their faith respects the liberty of rival religions and the conscience of those opposed to religion in general.

The reason for the consistency of this expanding circle model is that it depends on a single trait—human dignity—shared equally by all human beings, and not on the particular, distinguishing features (characteristics, interests, and claims) that vary between particular tribes of human beings. That does not mean these distinguishing features are unimportant or that they do not frequently contribute to the richness of our common life

¹ G.A. Res. 217 (III) A, pmbll., *Universal Declaration of Human Rights* (Dec. 10, 1948).

² For an in-depth discussion of the origin and development of the doctrine of the "inner self," see FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* (FARRAR, STRAUS, AND GIROUX 2018).

³ Rex Murphy, *B.C. groin waxing case is a mockery of human rights*, NATIONAL POST (JULY 19, 2019), <https://nationalpost.com/opinion/rex-murphy-b-c-groin-waxing-case-is-a-mockery-of-human-rights>.

together. But they cannot be the foundation of *human* rights, because human beings do not exemplify them equally and universally.

The rise of the new slavery, sex-trafficking, and ethno-religious persecution and genocide show how far our world has drifted from implementing the ideals of the UDHR. Article 3, which affirms a universal right to life, is flatly inconsistent with the permissive abortion laws of most western democracies. But the promise of the UDHR remains great. If more citizens, governments, and law-makers embrace it, the UDHR still provides a blueprint for consistent reforms and progress that would make our world more just and peaceful. Sadly, the vision of the UDHR is threatened by modernist and postmodernist philosophies that undermine its central tenet, the inherence of human dignity, and offer in exchange only counterfeit human rights.

MODERNIST NATURALISM: A FAULTY FOUNDATION

According to Naturalism, the world described by the natural sciences is all there is. This is very difficult to reconcile with the idea of human rights, since such rights can exist only if there are moral obligations, and these obligations find no foundation in a naturalistic world. The general problem is that natural scientific theories make no reference to final causes (i.e., goals or purposes): they simply tell us what kind of matter composes various objects and how events are related to one another by efficient causes. Suppose we consider two acts, a supreme act of kindness and a horrific act of torture. Natural science can note the different arrangements and motions of particles involved in the two acts, but has no resources to tell us that the first act was right and the second act was wrong. Without final causes, we cannot say that the act of kindness contributed to any goals, such as human flourishing or obedience to divine will, or that the second action frustrated such goals. As a result, attempts to ground ethics in nature routinely

run into the naturalistic fallacy: they make an invalid inference from natural facts about the way things are, to moral conclusions about the way they ought to be. That an action is cruel does not show that it is wrong unless we add the premise that we are not *supposed* to be cruel. But this appeals to final causes that natural science does not recognize.

Some ethical naturalists have conceded this point, arguing for a subjectivist⁴ or a constructivist⁵ ethics. But these views deny the existence of objective moral values and human rights. Other ethical naturalists claim that objective moral values and human rights supervene on the natural facts. For example, Erik Wielenberg claims that an action's being cruel *makes* it wrong.⁶ Wielenberg and other naturalistic moral realists argue that the natural history of human beings explains the emergence of features like consciousness and rationality that both confer special dignity on human beings and allow them to know they have such dignity. This approach to ethics traces back to the work of Charles Darwin, who thought that morality emerged from the evolution of human social instincts.⁷

Elsewhere, I have offered in-depth refutations of Evolutionary Ethics (EE),⁸ and of Erik Wielenberg's ingenious account.⁹ Here I will offer two of the major reasons why it is not plausible to ground human rights in natural history.

THE CONTINGENCY PROBLEM

The most fundamental problem for an evolutionary account of human rights is that it makes human worth depend on the details of natural history. Darwin himself recognized this contingency:

If...men were reared under precisely the same conditions as hive-bees, there can hardly be a doubt that our unmarried females would, like the worker-bees, think it a sacred duty to kill their brothers, and mothers would strive to kill their fertile daughters; and no one would think

⁴ See, e.g., the denial of objective moral values in: FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS*, in *THE PORTABLE NIETZSCHE* (WALTER KAUFMAN ED. AND TRANS., PENGUIN BOOKS 1976) (1888); JEAN-PAUL SARTRE, *EXISTENTIALISM IS A HUMANISM* (YALE UNIVERSITY PRESS 2007) (1945); and J. L. MACKIE, *INVENTING RIGHT AND WRONG* (PELICAN BOOKS 1977).

⁵ Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 *PHIL. STUD.* 109, no. 1 (2006).

⁶ ERIK WIELENBERG, *ROBUST ETHICS: THE METAPHYSICS AND EPISTEMOLOGY OF GODLESS NORMATIVE REALISM* (Oxford University Press 2014).

⁷ CHARLES DARWIN, *THE DESCENT OF MAN* (Prometheus Books 1998) (1871).

⁸ Angus J. L. Menuge, *Why Human Rights Cannot be Naturalized: The Contingency Problem*, in *LEGITIMIZING HUMAN RIGHTS: SECULAR AND RELIGIOUS PERSPECTIVES 57-78* (Angus J. L. Menuge ed., Routledge 2016).

⁹ Angus J. L. Menuge, *Alienating Humanity: How Evolutionary Ethics Undermines Human Rights*, in *THE NATURALNESS OF BELIEF: NEW ESSAYS ON THEISM AND RATIONALITY 107-122* (PAUL COPAN AND CHARLES TALIAFERRO EDS., Lexington Books 2019).

of interfering. Nevertheless, the bee, or any other social animal, would gain in our supposed case... some feeling of right or wrong, or a conscience. For each individual would have an inward sense of possessing certain stronger or enduring instincts, and others less strong or enduring.... In this case an inward monitor would tell the animal that it would have been better to have followed the one impulse rather than the other. The one course ought to have been followed, and the other ought not; the one would have been right and the other wrong....¹⁰

While in fact human beings do not see (select acts of) fratricide and female infanticide as moral duties, had they been raised like hive-bees, and depended for survival on that kind of social organization, they would. On one reading of Darwin, *Strong EE*, he is saying that in this counterfactual scenario, fratricide and infanticide would have been right: given a different natural history, the moral facts would have been different. On another reading, *Weak EE*, Darwin is only saying that our moral psychology might have been different (we might have had different moral beliefs), regardless of the moral facts.

However, neither Strong EE nor Weak EE provides an adequate justification for a robust defense of human rights in the spirit of the UDHR. Strong EE faces an ontological problem: it seems incompatible with the existence of human rights. Weak EE faces an epistemological problem: even if human rights exist, it does not seem we could ever know them.

To see the problem, consider the basic human right to life (UDHR Article 3). According to Strong EE, even if it is true in the actual world that brothers and female infants have a right to life, that is only a lucky accident, for if humans had been raised like hive-bees, they would have no such right. But this means that the right to life is not inherent in being human: one must be the *right kind* of human, one that has been raised in the right way. It also means that human rights are not inalienable. For suppose that a statist tyrant, enamored of entomology, decides that henceforth, all human beings must adopt the living organization of hive-bees. Over time, this would have the consequence that brothers and female infants would lose the right to life; so the right to life can be lost.

Now one might object that the hive-bee scenario is far-fetched. But in fact, even in the actual world, it is easy to find examples of societies which have claimed

that a highly discriminatory social organization is necessary for their "way of life": old and new forms of slavery, apartheid, the caste system, child labor, and even, under the Nazi Aktion T4 program, the elimination of mentally and physically unfit individuals deemed "life unworthy of life."¹¹ All of these modes of social organization can claim that the overall "fitness" of the community is enhanced by denying basic human rights to a minority. Once rights are tethered to the contingencies of how humans live, there is no foundation for universal, equal, and inalienable rights: they cease to exist.

Now consider Weak EE. Weak EE does not claim that the moral facts depend on natural history, so it is consistent with the existence of human rights. But if our moral sense depends on natural history, that sense is too unreliable to ground knowledge of human rights. Suppose we believe that brothers and female infants have a right to life, and that belief is true. Still, we cannot claim our belief in knowledge because its source is unreliable: had we been raised like hive-bees we would naturally have the false belief that brothers and female infants do not have a right to life. It is axiomatic in epistemology that there is a difference between a lucky guess that happens to be true (e.g., guessing the right answer on a multiple-choice test) and knowledge: one cannot know that p unless the belief that p is grounded in the (or a) reason why p is true. So Weak EE fails to explain our knowledge of human rights, and this undermines our confidence in human rights discourse.

THE VARIABILITY PROBLEM

As understood by the UDHR, human rights are universal and equal. To be consistent, moral realists who embrace Naturalism must ground human rights in the natural characteristics of human beings. But the problem is that these characteristics vary in unacceptable ways between human beings, so if human dignity supervenes on these characteristics it will not be universal or equal. Physical characteristics of strength and size differ enormously between human beings and some of them are paralyzed or afflicted with disabilities. Likewise, consciousness and rationality are not evident in the early stages of fetal development, the comatose, or those suffering severe psychological impairments.

Whichever characteristic we choose to ground human dignity, some human beings will not possess the characteristic at all, and some will possess it to a higher degree than others. So, as J. P. Moreland asks,

¹⁰ Darwin, *supra* note 7, at 102-103.

¹¹ See Robert Jay Lifton's harrowing account in *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (BASIC BOOKS 1986).

“Why should we treat all people equally in any respect in the face of manifest inequalities among them?”¹² Naturalism seems to force us to the conclusion that there are no universal, equal human rights, undermining Strong EE. Weak EE is also in trouble, because even if human rights do somehow exist, Naturalism has no credible account of how we could come to know them. On Naturalism, all knowledge must emerge from the causal interactions of brains with their environments as understood by empirical natural science. But dignity and justice are value properties, and “value properties are not empirically detectable nor are they the sorts of properties whose instances can stand in physical causal relations with the brain.”¹³

Naturalism cannot deliver authentic human rights. It can only offer the counterfeit of rights which are neither universal nor equal, and which cannot be known.

POSTMODERN AUTONOMY: INCOHERENCE AND INTRACTABLE CONFLICT

At first sight, the postmodern ethic of Autonomy might seem to be more promising. Perhaps we can ground human rights in the each individual’s quest to actualize his or her potential. As Francis Fukuyama points out, this idea traces to Rousseau, who argued that social conventions were obstacles to the development and flourishing of the individual’s “authentic inner self,” which is “intrinsically valuable.”¹⁴ At the legal level, Rousseau’s idea is reflected in a series of US legal decisions on abortion and same-sex marriage, which connect dignity to the ability to make choices without obstruction by prohibitive legislation.

In *Planned Parenthood v. Casey*, the right to abortion is grounded in the dignity of choice: “Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled.”¹⁵ This dignity is found not merely

in the ability to choose actions, but in the ability to define the meaning of one’s life:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁶

On this new understanding, the law must not obstruct individuals’ personal development (provided it does no harm to others), as this violates a person’s autonomy. While autonomy is an objective dimension of human beings that precedes the state, the law can help or harm our dignity by permitting or obstructing autonomous choices. It can also dispense dignity in two other senses of the word—dignity-as-respect, and dignity-as-status—by giving people the respect and status associated with legal recognition of their preferred lifestyle.¹⁷ In this sense, *United States v. Windsor* argued that New York’s decision to permit same-sex couples to marry respected their decisions and “conferred upon them a dignity and status of immense import.”¹⁸

Developing the idea of the autonomous self, *Obergefell v. Hodges* maintains that “the decision whether or not to marry is among life’s momentous acts of self-definition.”¹⁹ Autonomy is here understood as grounding not merely freedom of action but also freedom to define the kind of person one’s inner self wants to become (in this case, a married person). Were the law not to support same-sex couples seeking marriage, it “would disparage their choices and diminish their personhood”²⁰ and also “harm and humiliate” their children.²¹

According to this line of thought, which we may call “the new dignity jurisprudence,” human dignity is rooted in the power to determine autonomously what kind of person one would most like to be, and to have one’s lifestyle choices recognized and respected by the

¹² J. P. MORELAND, *THE RECALCITRANT IMAGO DEI* 144 (SCM PRESS 2009).

¹³ *Id.* at 149.

¹⁴ Fukuyama, *supra* note 2, at 10.

¹⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 920 (1992) (Stevens, J., concurring in part and dissenting in part).

¹⁶ *Id.* at 851.

¹⁷ For a careful distinction between various senses of “dignity,” see MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 114 (Harvard University Press 2012).

¹⁸ *United States v. Windsor*, 570 U.S. 744, 746 (2013).

¹⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (quoting *Goodridge v. Dep’t. of Pub. Health*, 440 Mass. 309, 322 (2003)).

²⁰ *Obergefell v. Hodges*, 135 S. Ct. at 2602.

²¹ *Id.* at 2590.

state. The law therefore becomes a partner in each individual's quest for self-actualization.

An obvious problem is that this notion of dignity shares the defect of naturalistic theories of human rights: it depends on a capacity—autonomy—that not all human beings have, and which human beings may have in varying degrees. The fetus and even newborn infants have little or no autonomy and neither do those children and adults afflicted with various psychological impairments, some of which may make them incompetent either to give evidence or be tried in a court of law. So autonomy fails to grant universal and equal human rights.

But even if this objection can be overcome, autonomy is a poor basis for human rights for several other reasons: it leads to arbitrary and inconsistent outcomes, intractable conflict, and the erosion of uncontroversial progress that has already been made.

ARBITRARY AND INCONSISTENT OUTCOMES

Casey holds that the permissibility of abortion is necessary to allow a mother to choose a meaning of life that does not include having a particular child. The problem is that no reason has been given to privilege the mother's decision over that of other actors, who could argue that the meaning of life they choose can only be fulfilled if the mother does have a child. Those self-identifying as fathers, grandmothers, and grandfathers can use exactly the same ground (the right to realize their self-chosen identity) to argue that the mother should have the child, which she is using not to have it.

Likewise, the reasoning used in *Obergefell* is clearly arbitrary and inconsistent. It claims that marriage must be redefined to include same-sex couples so that their choice to define themselves as married people is not disparaged. But as Chief Justice Roberts pointed out, if autonomy is the only ground for determining the proper meaning of marriage, this change in the definition of marriage is arbitrary:

Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved

while the man-woman element may not.... It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,”...why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?²²

Plural marriage, self-marriage, marriage to pets, cars, sports, and political ideologies could all be justified by the same reasoning used to advance same-sex marriage.

And in fact, this reasoning would also justify traditional marriage! For when *Obergefell* redefined marriage, it redefined it for everyone, including those who are repelled by an estate that is open to same-sex couples and who seek exclusively opposite-sex marriage. They can argue that their autonomous quest for self-realization has been thwarted and disparaged by the removal of the estate that they seek.

INTRACTABLE CONFLICT

The arbitrary and inconsistent nature of the new dignity jurisprudence is a recipe for intractable conflict. The reason is that directly opposite outcomes may be justified by the same general ground of autonomy. Instead of a consistent, expanding circle model of human rights, the law descends into a new tribalism of competing identity claims. The same ground used to permit abortion for those who do not want a child can be used to prohibit abortion by those who do want that child. The same ground used to modify traditional marriage to cater to some people's desires can be used to reinstate traditional marriage to cater to other people's desires. As Fukuyama warns, as our society splinters into ever smaller identity groups, the idea of universal human rights is supplanted by demands to advance the agenda of self-chosen tribes:

Identity politics...engenders its own dynamic, by which societies divide themselves into smaller and smaller groups by virtue of their particular “lived experience” of victimization.... This has

[A]utonomy is a poor basis for human rights for several ... reasons: it leads to arbitrary and inconsistent outcomes, intractable conflict, and the erosion of uncontroversial progress that has already been made.

²² *Id.* at 2621-22 (Roberts, J., dissenting).

created demands for recognition on the part of groups who were previously invisible to the mainstream society. But this has entailed a perceived lowering of the status of the groups they have displaced, leading to a politics of resentment and backlash.²³

EROSION OF PROGRESS

The clearest proof that something is terribly wrong with the new dignity jurisprudence is that it has already abridged or reversed uncontroversial progress in the expansion of human rights protections. For example, a great advance for the human rights of women was the recognition that their exclusion from many sports and athletic teams and events violated their human right to equal treatment. On June 23, 1972, President Nixon signed into law various education amendments, including Title IX, which forbade any sex-based discrimination in institutions that receive federal funding. As a result of this reform, there has been a tremendous increase in the participation of women in athletic and sports teams and events. However, in May 2016, the Department of Education sent a “Dear Colleague Letter” which asserted that Title IX “encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.”²⁴ This led many public facilities to permit students to use the locker rooms and restrooms of the gender with which they identified, even if that differed from their biological sex at birth.

Although this letter was subsequently rescinded,²⁵ there is currently no settled policy on transgender issues, and a number of athletic and sporting organizations have allowed transgender athletes to compete, most often individuals born male who self-identify as female, and who maintain less than a maximum level of testosterone. Allowing such individuals to participate in women’s teams and events has already led to a significant backlash at high schools in the seventeen states that currently permit them to compete without restrictions (such as required sex-reassignment surgery or hormone therapy) against cisgender girls (those whose gender coincides with their biological sex at birth), on the grounds

that the transgender individuals have unfair advantages in natural speed, size, and strength.²⁶ In the name of recognizing the alleged right of biological males to self-identify as females, the uncontroversial advances of cisgender females to increased participation in sports and athletics are now being seriously eroded, as women who would have previously qualified for teams and scholarships now fail to do so.

A more ominous example concerns the basic right of women to free assembly without threat of sexual molestation. Enormous strides have been made in protecting this right, but they are now being seriously challenged by the alleged rights of immigrants not to be stigmatized for behavior at variance from a country’s established norms. On New Year’s Eve, 2015, women attending a public celebration suffered the trauma of mass groping and sexual violation in Cologne, Germany.²⁷ Many complaints were made that both the celebration’s organizers and council officials delayed reporting the assaults to the police to avoid the appearance of discriminating against migrants. If true, it suggests a view of rights on which self-identifying as the member of a different culture with a different understanding of morality and the law permits abridging the basic, hard-won rights of women to assemble without fear of sexual abuse. This violates the expanding circle model of universal, equal rights enshrined in the UDHR.

Autonomy cannot deliver authentic human rights. It can only offer the counterfeit of arbitrary, inconsistent, and conflicting rights claims, and can even reverse previous advances.

CHRISTIAN THEISM: THE TRUE FOUNDATION OF HUMAN RIGHTS

The antidote to the counterfeit rights of modernism and postmodernism is found in Christianity. The Bible does not base special human dignity on the variable natural capacities and desires of human beings, but rather on God’s unconditional pro-attitude to all mankind. This attitude is reflected in several biblical teachings. All human beings, without exception, are specially made in the image of God (Gen 1: 26-27; Psalm 8: 5-8), and that fact is not affected

²³ Fukuyama, *supra* note 2, at 164-165.

²⁴ U.S. Dep’t of Educ. and U.S. Dep’t of Justice, Dear Colleague Letter on Transgender Students (May 13, 2016), at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

²⁵ U.S. Dep’t of Educ. and U.S. Dep’t of Justice, Dear Colleague Letter (February 22, 2017), at 1, <https://assets.documentcloud.org/documents/3473560/Departments-of-Education-and-Justice-roll-back.pdf>.

²⁶ Associated Press, *Transgender high school athletes spark controversy, debate in Connecticut*, FOX NEWS (February 25, 2019), <https://www.foxnews.com/sports/transgender-high-school-athletes-spark-controversy-debate-in-connecticut>.

²⁷ Justin Huggler, *Cologne assault: ‘They were groping us and trying to pull us away’, says teenage victim*, DAILY TELEGRAPH (JANUARY 6, 2016), <https://www.telegraph.co.uk/news/worldnews/europe/germany/12085681/Cologne-assault-They-were-groping-us-and-trying-to-pull-us-away-says-teenage-victim.html>.

by any particular capacity we do or do not have, and is equally shared by *all* human beings. In the incarnation, God became a human being, and not some other creature, like a cat or a tree; and now for all eternity, the person of Christ unites a divine and a human nature. This shows God's special solidarity with *all* human beings (Hebrews 2: 17). And Christ came to die for our sins, because God "desires *all* people to be saved and to come to the knowledge of the truth" (1 Timothy 2: 4, emphasis mine).

In both the Old Testament and the New, we are taught that we are to love our neighbor (Leviticus 19: 18, Matt. 19: 19, 22:39), and this includes everyone, including migrants (Exodus 22: 21), slaves and women (Gal. 3: 28), the poor, the sick, and the incarcerated (Matt. 25: 35-40). Christ came to those whose sin made them powerless to be right with God (Romans 5: 6-8) and sacrificed himself for those who could give him nothing in return. Christians are called to pursue lives of self-sacrifice, showing love to the "least of these" (Matthew 25: 40), including those who could not repay (Luke 14: 12-14). Jürgen Habermas acknowledges that it was the Bible, not human philosophy, that brought the idea of human rights and dignity into the world:

Egalitarian universalism, from which sprang the ideas of freedom and a social solidarity, of an autonomous conduct of life and emancipation, the individual morality of conscience, human rights, and democracy, is the direct heir to the Judaic ethic of justice and the Christian ethic of love. . . . Everything else is just idle postmodern talk.²⁸

A thorough defense of the Christian origins of human rights deserves another article. But it should at least be clear that God's universal love for all human beings without regard to their characteristics or circumstances, makes the idea of universal and equal human rights intelligible.

CONCLUSION

The UDHR paints an attractive and robust account of fundamental rights enjoyed equally by all members of the "human family." It offers an "expanding circle" model that allows rights protections to be extended to neglected groups without reversing gains that have already been made. But, if it is consistent, modernist Naturalism must deny that all human beings have equal rights. And postmodernist Autonomy leads to an ever-expanding sphere of arbitrary, inconsistent, conflicting rights claims and threatens to reverse the historic gains of the past. These human philosophies can only produce counterfeit rights that fail to live up to the great promise of the UDHR. By contrast, the biblical account rests on God's attitude of universal and equal love for all mankind. This is the true foundation of human rights.

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²⁸ JÜRGEN HABERMAS, TIME OF TRANSITIONS 151-152 (C. CRONIN AND M. PENSKY TRANS., POLITY 2006).



EMBODIED AND DISEMBODED DIGNITY

BY GRÉGOR PUPPINCK

The very broad consensus on the notion of dignity hides a fundamental disagreement as to its meaning. Despite its success, dignity has never stopped being debated, fueled by the vagueness of its definition and justification,¹ to the point of making some say that it is a mere slogan, a vague concept² aiming at concealing the lack of an objective basis for human rights, and ultimately a “useless”³ notion that it would be better to abandon, for the sake of clarity. Thus the notion which claims to theoretically found the edifice of human rights, and beyond that of the democratic ideal, remains contested not only in its existence and its meaning, but even in its reality.

The notion of dignity is supposed to contain the definition of man and the basis of his rights. The ambiguity as to its meaning results from a deeper disagreement as to what Man is and what his value is. Yet, the content of human rights depends on what man is and their authority on his value. Thus any ambiguity on human dignity is reflected in all human rights.

Everybody agrees to recognize that the value of man clearly appears in what visibly distinguishes him from animals: his intelligence, his conscience, his freedom, his will; what is usually called his “spirit.” Disagreements arise when one wonders what that spirit is. Whence does this extraordinary faculty come to man, and what relationship does it have with the rest of the world—made of “matter”—especially with the body? Has man been created? Are the mind and body in a harmonious or antinomic relationship?

Is man human because of his spirit, and animal because of his body, or is he human because of the union of both?

This fundamental issue arose during the drafting of the Universal Declaration of Human Rights and has direct consequences on the definition of human rights. Two currents of thought were then dominant and confronted: the anthropologies of Christian or of materialistic inspiration. This alternative was then embodied in the confrontation between Catholic philosopher Jacques Maritain and naturalist free-thinker Julian Huxley. Both have had a significant intellectual influence on the development of the Universal Declaration. Through these two personalities, two traditions bear opposing conceptions of man and lead to two understandings of his dignity: the *dignity of the human person* and the *disembodied dignity of the individual*.

The dignity of the human person simply expresses the value of what distinguishes man above other creatures, namely his reason and his freedom, that is, the possession of a “spirit.”

THE DIGNITY OF THE HUMAN PERSON

Carried by personalist philosophers and post-war Christian politicians, the conception of dignity is part of a long tradition that originated in Greek, Jewish, and then Christian schools of thought. In summary, it is first based on the observation that man is part of a whole (the cosmos) and that he occupies an eminent place there; then on the fact that man must, consequently, respect this dignity in himself and in everything else. To live worthily is to live according to human nature. From this demand arises natural

¹ CHRISTOPHER MCCRUDDEN, *IN PURSUIT OF HUMAN DIGNITY: AN INTRODUCTION TO CURRENT DEBATES*, IN UNDERSTANDING HUMAN DIGNITY (BRITISH ACADEMY REPT. ED. 2014).

² Olivier Cayla, *Dignité humaine: le plus flou de tous les concepts*, LE MONDE (FR.), JAN. 31, 2003, https://www.lemonde.fr/archives/article/2003/01/30/dignite-humaine-le-plus-flou-des-concepts_307378_1819218.html.

³ Ruth Macklin, *Dignity is a useless concept*, 327 BRIT. MED. J. 1419 (2003).

morality and law, which recognize as good and just that which participates in the fulfilment of human nature.

The dignity of the human person simply expresses the value of what distinguishes man above other creatures, namely his reason and his freedom, that is, the possession of a “spirit.” Aristotle teaches that man is “the best among living beings,” but he is not the best in the universe: the order of the world and its elements are superior to him.⁴ According to the classical approach, man owes his superiority not to himself, but to nature; it is nature that excels in man and not man who excels in nature. This excellence does not push man to want to dominate the universe, but to be part of its harmony, because nature is vaster and more perfect than man.⁵ Cicero writes in this sense that “to live according to nature is the supreme good.”⁶

For believers, Jews then Christians, it is the Creator who raised man above the animal condition by infusing him with a spiritual soul to bring him to the life of the spirit and to destine him to eternal life. The Psalmist says of man that God “wanted him a little less than a god, crowning him with glory and honor” and that He put “all things at his feet” (Psalm 8). God thus established man just beneath Him. Man has the dignity of a creature, of an heir, of a son. It is not deserved and man could not boast of it but must live up to it,⁷ namely with dignity.

THE PERSON IS WORTHY “BODY AND SOUL”

Synthesizing Aristotle and the Gospel, Saint Thomas Aquinas insists that man is worthy with his body, even if it is by virtue of his reason and his freedom that he is made in the image of God.⁸ Aristotle already emphasized that “the soul and the body are but one”⁹ because there can be no living body without a soul; their opposition is illusory. Genesis also says of man

that he is a “living soul,” God having breathed into man “a breath of life” (Genesis 2:7). St. Augustine insists that man is properly “the union” of soul and body,¹⁰ unlike angels who have no body and animals which do not have a mind. Being both at the same time is specific to man.

The body thus shares the dignity of man; it is not separable from man. Saint Paul says that it is “the temple of the Holy Spirit”;¹¹ God Himself therefore esteems man worthy enough to make man’s body His dwelling. Moreover, the body of man is not destined for the corruption of death; he is also called, at the end of time, to the “resurrection of the flesh,” that is, to eternal life. “All flesh shall see the salvation of God,” says Saint Luke. Thus, flesh is not bad; it is not matter that introduced corruption and death, but sin. In the Christian faith, man’s characteristic is to be the union of a body and a soul, and that is how he is worthy and must live, keeping himself from the double temptation to identify himself exclusively by his mind (to be an angel) or his body (to be a beast) because, then, he will disfigure the human nature in him.¹² As a result, the human body is ennobled by this high dignity and destiny, and man must learn to live according to his nature, in a unified and harmonious way. This point is crucial and sometimes as difficult to admit as to live. The Christian (patristic) tradition teaches that some of the angels revolted against the fact that a bodily being (man) was elevated to a dignity which they considered reserved for purely spiritual beings. Moreover, these angels—then become demons—would have been scandalized by the incarnation of God and would have refused to worship God-made-man in the person of Christ.¹³ The union of mind and body may thus seem scandalous and unnatural, like the alliance of fire and earth, but it is the specificity and the mystery of man, what makes the difficulty and the happiness of the human condition.

⁴ ARISTOTLE, *NICOMACHEAN ETHICS* BK. VI.

⁵ See, e.g., RÉMI BRAGUE, *LE PROPRE DE L’HOMME: SUR UNE LÉGITIMITÉ MENACÉE* (Flammarion 2013).

⁶ CICERO, *DE LEGIBUS* BK. I.

⁷ GIANNOZZO MANETTI, *ON HUMAN WORTH AND EXCELLENCE* (Harvard Univ. Press 2019) (1452).

⁸ Thomas De Koninck, *Dignité de la personne et primauté du bien commun*, 70 *LAVAL THÉOLOGIQUE ET PHILOSOPHIQUE*, NO. 1, 13-25 (2014).

⁹ ARISTOTLE, *DE ANIMA* BK. II.1.412 AT 27-28, BECAUSE THE SOUL IS “THE FIRST REALIZATION OF A NATURAL BODY WITH POTENTIAL OF LIFE.”

¹⁰ SAINT AUGUSTINE, *DE CIVITATE DEI* BK. XXI.10.

¹¹ 1 *Corinthians* 6:19.

¹² De Koninck, *supra* note 8.

¹³ Which is the reverential greeting of the Archangel Gabriel to the Virgin Mary at the annunciation, following which the incarnation took place.

HUMAN NATURE IS GOOD

If human nature is worthy, it is above all because it is good. The idea of the natural goodness of nature is not self-evident, especially when one considers suffering and death. But for Christians, nature is good because it is the work of a good God who noted, seeing all that he had done on the sixth day of creation, “that it was good, and even very good” (Genesis 1:31). Moreover, the nature of man is excellent because he was created in the image of God. True, original sin has hurt it, but the incarnation of Christ and his sacrifice on the cross restore the dignity of man and raise it for, choosing to become a man, God gives him a dignity that no other creature, even angelic, can claim. Saint Leo the Great (5th century) thus sums up the Christian conception of dignity: “Awake, O man, and recognize the dignity of your nature! Remember that you were created in the image of God. If, in Adam, it was degraded, in Christ it was restored.”¹⁴

UNIVERSAL DIGNITY AND FRATERNITY

Human nature is shared, in inheritance, by all descendants of Adam. Fraternity and dignity are therefore universal, all men participating in it regardless of their differences, because they find their source more deeply than in race, nation, education, or sex. They find it in the common human nature which is itself an intention of God. This is where dignity is inherent¹⁵ to the person. Universality perfectly puts up with diversity and inequality of condition. Moreover, by charity, Christ teaches the love of neighbor, even and especially when he is a foreigner and therefore different, and beyond the demands of justice. This charity realizes in acts the fraternity in God.

TO LIVE WORTHILY IS TO FULFIL ONE’S NATURE

The desire for fulfilment and perfection is a universal law. Everything in man, as in every living being, animal or plant, tends irresistibly to be fulfilled according to its nature. The fire tends to spread, the seed

to become a plant, the flower a fruit, the child a civilized adult, etc. Man is born unfinished, but contains within himself all the potentialities of human nature. While other beings live as prisoners of their nature, conditioned by it, man has a certain freedom that makes him responsible for his own accomplishment. From conception to death, all the effort of a human life is for each one to fulfil in oneself the potentialities of human nature: to be humanized. The Romans saw in this desire a duty, that of “perfecting human nature in oneself and respecting it in others.”¹⁶ They called it *Humanitas*. By recognizing their dignity, men thus oblige one another to respect their common nature in themselves and in the other, namely, to live with dignity.

From this desire and duty of perfection arises a natural morality by virtue of which a thing is good or bad according to whether it contributes to the accomplishment of human nature or not. For example, instruction and physical activity are particularly good in that they allow children to grow. Quoting Aristotle,¹⁷ St. Thomas observes that “good is what all beings desire,” it is “what each thing seeks insofar as it desires its perfection.”¹⁸ Good is therefore determined by human nature: things are good or bad according to whether they are suitable to human nature or not. It is human nature that is at the origin of morality, hence the importance of knowing this nature. The Greek and then Christian philosophers¹⁹ distinguished four fundamental aspects: man is by nature a being; living; social; and spiritual. Each of these aspects is a good which produces in man a special inclination: like any *being*, man desires to maintain his existence. Like any *living being*, man desires to give life. As a *social* (or political) *being*, man desires to live in society.²⁰ Finally, as a *spiritual being*,²¹ man desires to know the truth and God. Everything that answers these desires is good, all that hinders them (death, sickness, loneliness, error) is an evil. From these inclinations, it is possible to determine a rule of conduct, in other words, a morality. This morality is natural because it derives from human nature. It is

¹⁴ Saint Leo the Great, Sermon for Christmas, Sermo 1 in *Nativitate Domini*, 1-3; PL 54, 190-193, <https://catholicism.org/leo-christmas.html>.

¹⁵ Quality is inherent if it is necessarily contained in a person or thing; it is an inseparable property.

¹⁶ MICHEL VILLEY, *LE DROIT ET LES DROITS DE L’HOMME* 87 (Presses Universitaires de France 2d ed. 2014).

¹⁷ This thought is the basis of Aristotle’s *ETHICS*.

¹⁸ Charles De Koninck, *De la primauté du bien commun contre les personnalistes*, quoted in Sylvain Luquet, *Charles De Koninck et le bien commun*, 70 *LAVAL THÉOLOGIQUE ET PHILOSOPHIQUE*, NO. 1, 45-60 (2014).

¹⁹ SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, I-II.94.2.

²⁰ Jean-Jacques Rousseau will oppose this understanding by arguing that society corrupts men.

²¹ By spiritual, I mean endowed with a spirit, that is, able to reflect, to think on oneself.

the way, the “straight path” through which the person accomplishes his being, his human nature: it is the “natural moral law,” the “law engraved in hearts”²² accessible through reason. Thus, this “natural law” does not create good, but it is good that determines the law. Reason deduces the law of the desired good, as one deduces a path from a goal to attain. By observing this law, the person accomplishes himself and finds his good there.²³

NATURAL LAW

This natural law exists independently of the will of legislators; it is at the origin of human rights. The latter gave it an international legal force by guaranteeing everyone the opportunity to be fulfilled as a human being. It is by observing the character of human nature that the content of human rights can be deduced. Thus, the observation that man is by nature a *living, social and spiritual being* makes it possible to deduce that human rights must protect the life and physical integrity of the persons (being), their ability to found a family (living being) and to associate and express themselves (social being), and finally their freedom of conscience (spiritual being). Consideration for the nature and dignity of the human person thus makes it possible to establish human rights, their purpose, their content, their authority, and their universality.

It should be noted here that natural law differs from justice in that the object of the former is *good* and that of the latter is *right*. While the natural law recognizes that everyone has the natural right to be fulfilled according to his nature, justice is a matter of equity; it consists in “attributing to others what is due to them” (“*cuique suum tribuere*”).²⁴ Yet, human rights can serve

justice, in that, for example, food and education are due to children, but justice is more than that.

It is from this conception of human nature and dignity that philosophers and diplomats, including Frenchman Jacques Maritain and Lebanese Charles Malik, drew their vision of human rights. They deeply inspired and influenced the writing of the Universal Declaration. They wanted to prevent it from adopting a materialist, individualist, or collectivist understanding of the human being. They did not fully succeed. As noted by Maritain, opinions are divided about

human rights “in two opposing groups: those who accept more or less explicitly and those who more or less explicitly refuse the ‘natural law’ as the basis of these rights.”²⁵

Contrary to this classical and Christian understanding of the human person and of his natural rights, another equally ancient philosophical tradition advocates a diametrically opposed conception of the human being, his dignity, and his rights.

THE DISEMBODIED DIGNITY OF THE INDIVIDUAL

This other tradition recognizes the dignity of man only in his spirit, to the exclusion of his body, a mere mortal envelope. The superiority of man over animals being his spirit, his humanity and his dignity are only found there. This idea generates a dualism that distinguishes and opposes mind to body as two entities of unequal and irreconcilable values. Only the human mind would be properly human; the body would be animal. The identification of human dignity with mere spirit leads to treating the body with contempt. According to this conception, man is all the worthier as he lives according to spirit and dominates his body. Through this dialectic, we see the emergence of the

[N]atural law differs from justice in that the object of the former is good and that of the latter is right. While the natural law recognizes that everyone has the natural right to be fulfilled according to his nature, justice is a matter of equity; it consists in “attributing to others what is due to them.”

²² AQUINAS, *SUPRA* NOTE 19.

²³ For a current synthesis on the natural law, see INT’L THEOLOGICAL COMM’N, IN SEARCH OF A UNIVERSAL ETHIC: A NEW LOOK AT THE NATURAL LAW (2009), http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html.

²⁴ Alain Sériaux, *L’objectivité du “ius” selon Saint Thomas d’Aquin*, 40 PERSONA Y DERECHO 257-270 (1999).

²⁵ Jacques Maritain, *Introduction* to EDWARD HALLETT CARR, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS; A SYMPOSIUM EDITED BY UNESCO 14 (WINGATE 1949).

idea that man would rise in dignity as his spirituality developed and his corporeality reduced. As a result, the more capable of abstract, intellectual, and artistic activities man is, the more worthy he would be.

This school of thought has very old roots. Plato has Socrates say, “while we are in the body, and while the soul is mingled with this mass of evil, our desire will not be satisfied, and our desire is of the truth.”²⁶ For Plato, the body is the “prison of the soul”: man is “nothing but the soul” who “uses the body”²⁷ as a navigator uses a ship. The body is an obstacle to knowledge to be purified.²⁸ We find this school of thought in the heart of the ancient gnostic²⁹ tradition, which is articulated precisely on the opposition of mind and matter, and according to which the spirit (called *pneuma*) is a “divine spark” imprisoned in a body which one must free oneself of to reveal the divinity that is in man. Men would seek to free themselves from matter and rise to spiritual fullness, a divine perfection (called *pleroma*) in which they could all be brought together. Gnosticism is a heresy that has persisted, in various forms, to the present day.

At the beginning of the modern era, this tradition intensified and was carried especially by Jean Pic de La Mirandole who, in the famous speech *On the Dignity of Man* (1486), makes God, addressing a new Adam, say: “I did not make you celestial or terrestrial, neither mortal nor immortal, so that, sovereign of yourself, you can complete your own form freely, in the manner of a painter or a sculptor. You will be able to degenerate into inferior forms, like those of animals, or regenerated, to attain the higher forms, which are divine.”³⁰ It is in the plasticity of man and in his capacity to lift up to divinity that his dignity resides. Rephrased in the 17th century, especially by the British Lord Chancellor Francis Bacon,³¹ this school of thought was then asserted forcefully in the 18th and even more in the 19th century, around the

idea that man would be indefinitely perfectible,³² that is to say that there would be no end to his perfection, that he would not be limited by a predefined human nature but could continually improve himself.

DIGNITY, THE FRUIT OF EVOLUTION

In the 19th century, Spencer and Darwin’s formulation of the theory of evolution by the selection of the fittest allowed this school of thought to synthesize scientific and gnostic discourses on a materialist basis and in a progressive perspective. The theory of evolution offered an atheistic explanation of anthropogenesis, less fanciful than those provided by the gnosis of antiquity. According to this synthesis, the human mind is an emergent property derived from matter, the summit of a process of evolution that tends to rise endlessly by becoming spiritualized. We thus understand how atheistic materialism leads to spiritualism.³³ The value and dignity of man reside entirely in his mind, which he alone possesses, making him a “unique being.”³⁴ Placing humanity and the dignity of man only in his own mind leads to a dualism opposing the mind to the body and to all matter; such a dualism justifies all forms of domination of the body by the will.

Atheism feeds this school of thought, because the rejection of the creator-God is accompanied by that of the creature-man. If God does not exist, man has not received an immortal soul from higher than him but he possesses a spirit that he has extracted from matter, from below him, as evolution went on. If God does not exist, man would then draw from himself his own dignity and this would be commensurate with his degree of spiritualization, that is, self-extraction from matter: it would know no limit.

This school of thought was widely disseminated by Charles Darwin’s friend Thomas Huxley, before

²⁶ PLATO, PHAEDO §§ 66B-66E.

²⁷ PLATO, *THE APOLOGY OF SOCRATES* § 36C.

²⁸ PLATO, PHAEDRUS § 67A (“THE WAY TO BE AS CLOSE AS POSSIBLE TO KNOWLEDGE IS TO HAVE THE LEAST POSSIBLE TRADE WITH THE BODY AND TO PURIFY OURSELVES”), QUOTED IN ROLAND HUREAUX, *GNOSÉ ET GNOSTIQUES: DES ORIGINES À NOS JOURS* 134 (DESCLÉE DE BROUWER 2015).

²⁹ HUREAUX, *SUPRA* NOTE 28.

³⁰ GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 7-8 (A. ROBERT CAPONIGRI TRANS., REGNERY 3D PRtg. 1956), http://www.andallthat.co.uk/uploads/2/3/8/9/2389220/pico_-_oration_on_the_dignity_of_man.pdf

³¹ Author of *De dignitate et augmentis scientiarum* and of *Novum Organum* in *INSTAURATIO MAGNA SCIENTIARUM* (1620).

³² JEAN-ANTOINE DE CONDORCET, *ESQUISSE D’UN TABLEAU HISTORIQUE DES PROGRÈS DE L’ESPRIT HUMAIN* 81, 293 (FLAMMARION 1988).

³³ On the current of atheistic spiritualism, see PHILIPPE MURAY, *LE XIXE SIÈCLE À TRAVERS LES ÂGES* (DENOËL 1984).

³⁴ JULIAN HUXLEY, *THE UNIQUENESS OF MAN* (1943) (EBOOK), <https://archive.org/details/TheUniquenessOfMan/page/n5>.

being developed by his grandson, Julian Huxley. Julian was not only the most distinguished representative of this school of thought in the middle of the 20th century, and one of the most eminent freethinkers of his time,³⁵ but he was also the first director-general of UNESCO in 1946. At the time, he was already well-known for having published many works with evocative titles, such as *“Religion without revelation”* (1927) or *“Evolution: the Modern Synthesis”* (1942). Convinced that the mind is the fruit of evolution, he affirmed that man could, by an intense selection of chimpanzees, create in them, within a few generations, the capacity of speech and thought, namely the spirit. Continuing this reasoning, and considering that evolution proceeds as much by the acquisition of new capacities as by the abandonment of old ones (skin replaces scales, fins are transformed into hands, etc.), he estimated that certain human characteristics are like a weight which would slow down evolution (such as an animal cluttered with atrophied wings). This led him to wonder whether “the aim should not be to let the mammal die within us, so as the more effectively to permit the man to live.”³⁶ Here we find the gnostic idea that true man would be as prisoner of his corporality.

In 1946, he took the reins of UNESCO, a “branch” of the United Nations whose mission is no less than “to build peace in people’s minds” by establishing an “intellectual and moral solidarity of humanity.”³⁷ As soon as he took office, he published a manifesto entitled “UNESCO, its aims, its philosophy”³⁸ in which he set out his own thinking. According to him, UNESCO should adopt “a universal scientific

humanism unifying the different aspects of human life and inspired by evolution.” He declared himself “against the idea of the supernatural” and saw in the spirit “the source of all values.”³⁹ In this context, dignity takes on a very special meaning, diametrically opposed to that resulting from Christian thought. Huxley believed that the dignity of man is scientifically justified by evolution that would demonstrate “that a well-developed human being is at present the highest product of evolution.”⁴⁰ Evolution would thus be the source, but also the measure of the dignity of man. The more a man is “well developed,” that is to say, evolved, the more worthy he would be and vice versa.⁴¹

At the same time, another biologist-philosopher, Pierre Lecomte Noüy published a book entitled *Human Dignity* in which he offered an excellent summary of this materialistic conception of man. It deserves to be quoted for the clarity of its purpose and to show that this thought is rather widely shared at this time:

Evolution...is the story of the successive phenomena that made possible the birth of thought and consciousness. It consists of a succession of stages, each of which represents an enrichment and a liberation. It is as if the spirit could only have been realized progressively, by abandoning the scaffoldings that had become useless as a result of the emergence of more perfect forms evolving slowly towards the ultimate perfection, still far away... It is against this heredity, against this immense accumulation of memories dating from times gone forever and meaningless today, that man

*Placing humanity and the
dignity of man only in his
own mind leads to a dualism
opposing the mind to the body
and to all matter; such a dualism
justifies all forms of domination
of the body by the will.*

³⁵ In 1952 he presided over the founding congress of the International Humanist and Ethical Union, a worldwide federation of associations of Freemasons, humanists, atheists, rationalists and laymen. He was also a member of the First Humanist Society in New York.

³⁶ JULIAN HUXLEY, *EVOLUTION: THE MODERN SYNTHESIS* 575 (GEORG ALLEN & UNWIN LTD. 1963) (1942).

³⁷ Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), November 16, 1945, <https://unesdoc.unesco.org/ark:/48223/pf0000261751.page=6>

³⁸ JULIAN HUXLEY, *UNESCO: ITS PURPOSE AND ITS PHILOSOPHY* (PREPARATORY COMM’N OF UNESCO) 1946, <https://unesdoc.unesco.org/ark:/48223/pf0000068197>

³⁹ Huxley, *supra* note 34.

⁴⁰ Huxley, *supra* note 38 at 17.

⁴¹ Consistent with this evolutionary and biological conception of dignity, Huxley was also a fervent eugenicist; until 1944 he was vice-president of the *British Eugenics Society*.

must struggle to prepare for the emergence of the purely spiritual being that he must become.... Evolution continues in our time, not on the physiological level, but on the spiritual and moral levels.⁴²

A NEW MORALITY

From this conception of man stems a new morality, summarized by Pierre Lecomte de Noüy:

Henceforth, good consists in the respect of the dignity acquired by moving away from animal ancestors and by obeying the orders of the conscience, that is to say by contributing to the progress of evolution. And the evil consists in the return to animality, the obedience to physiological orders, the ignorance of human dignity, the refusal to participate in the divine work, the evolution.⁴³

We can briefly identify some aspects of this morality:

Good is the “progress of evolution”

The object of the disembodied dignity is “spirit” which itself is defined in opposition to matter. Disembodied dignity denies the value of anything material which “imprisons” the spirit. Everything that conditions the person (family, history, nation, heritage, etc.) is depreciated. Thus, according to this morality, evil is the animality, the inheritances of the past, matter. Note that good is not defined in itself, but only in opposition to evil, like an indefinite movement of liberation from materiality, like the progress of evolution-spiritualization.

The unlimited transcendence of the spirit

This disembodied dignity absolutely transcends matter: it carries the individual above material reality. According to classical and Christian schools of thought, man is able to know God and the transcendentals (the good, the true, the beautiful), but he does not contain in himself the principle of transcendence. To say, on the other hand—as evolutionist materialists do—that man is himself transcendent is to recognize his unconditional and limitless power and dignity, hitherto reserved to God. If man is

transcendent, nothing can stop him, he has no measure. Such would be his true dignity; almost a majesty.

Individuals do not all have the same dignity

According to the materialist conception, the dignity of each individual depends on his own degree of spirituality; it is therefore relative.⁴⁴ Thus, every being has a dignity which is proportionate to his intellectual capacities; it varies during the life of each individual with the growth and decline of his abilities, but also from one individual to another, because it is the possession of these abilities that would make one’s humanity. Recall that, on the contrary, for the upholders of the dignity of the human person, dignity is attached to human nature, which is the same for any person, whatever he is and at all times.

The primacy of the will

The individual will expresses the spirit. Thus, the transcendence of the spirit confers on individual wills a primacy over the material aspects of society. Conversely, according to the embodied conception of the person, it is intended to be part of reality and to seek harmony in it.

The spirit dominates the body

Disembodied morality no longer consists in respecting one’s body by using it according to its nature; it recommends on the contrary not to respect it and to submit it to free the spirit of “physiological orders.” Moreover, because the mind is like a prisoner of the body, it is not responsible for acts accomplished under the influence of animality. The mind is morally innocent of the turpitudes of the flesh, it is the victim while being eventually the beneficiary of the pleasure that it provides (which is quite convenient).

Dissatisfaction or happiness

The creature-man finds happiness in his fulfilment, in a search for harmony with the world, which implies a form of moderation. For the Christian, the bliss of natural fulfilment is increased by the supernatural fullness that the relationship of love with his Creator offers. The acceptance by man of his own condition, of his limits, makes his happiness possible, and it is

⁴² PIERRE LECOMTE DU NOÛY, *LA DIGNITÉ HUMAINE* 14-15 (LA COLOMBE 1952) (1944).

⁴³ *Id.*

⁴⁴ For Hans Jörg Sandkühler, UNESCO Chair in Philosophy, “dignity is a relative concept.” See Hans Jörg Sandkühler, *Human Dignity, and the Transformation of Moral Rights into Legal Rights*, 2 *Iris Euro. J. of Phil. and Pub. Debate*, no. 4, 349-362 (2010), <http://www.fupress.net/index.php/iris/article/viewFile/8986/8357>.

in his relationship with God that he can get a feel of infinity. On the contrary, the man-creator enjoys himself in his quest for progress. The higher he ascends, the more worthy he is, the more he enjoys himself. But this search is endless because perfection does not exist outside of God. The man-creator is moved by a perpetual dissatisfaction which has nothing in common with happiness.

Individuals are naturally rivals

Men, as products of Evolution, are caught in the inexorable and positive process of competition for the selection of the fittest. This law comes to prove Hobbes right, as for him man is a wolf to man. In contrast, the man-creature of a benevolent God is fundamentally good.

The exposition of this materialistic morality provides a key to understanding the profound upheavals that occurred in the 20th century in the West in our relationship to the body, especially regarding abortion, euthanasia, and sexuality. It also explains the bankruptcy of a disembodied dignity. But the classical Christian understanding of the human person as creature made in the image of God, and thus the nature and embodied dignity of the human person, makes it possible to establish universal human rights.

*This article is a translation of a speech presented at a conference at Oxford, UK in August 2018. It summarizes some reflections presented in the book *Les droits de l'homme dénaturé (Le Cerf, 2018)*.*

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ADDRESSING VIOLENCE AND PERSECUTION BASED ON RELIGION OR BELIEF

The Very Test of Our Christian Values

BY EWELINA U. OCHAB

While it is not exclusive to them, Christians consider caring for fellow human beings, especially the vulnerable, as a Christian value. This is derived from biblical teaching and particularly the parable of the Good Samaritan. Caring for others has various manifestations. Among others, many Christians feel very strongly about the need to protect the unborn from the practice of abortion or those suffering from incurable diseases from euthanasia or assisted suicide. They cite caring for the most (physically) vulnerable members of society and the sanctity of life as ultimate values that require adequate protection at all times. However, to ensure that the values are meaningful and remain as such, it is crucial to ensure that they truly cover everyone—including those people around the world who are, on the face, less (physically) vulnerable who are targeted for their religion or belief. Indeed, in recent years we have witnessed an increase in acts of violence or persecution based on religion or belief. Addressing such atrocities and assisting those targeted should be a priority for anyone caring about the sanctity of life and the need to care for others. The very test of our Christian values and our humanity is how we stand up for others.

This article focuses on the issue of acts of violence and persecution based on religion or belief, and the situation of religious minorities facing the most egregious atrocities and often annihilation in different parts of the world. First, I consider the issue of persecution based on religion or belief and what this means to religious minorities. Second, I discuss two of the worst cases of persecution from the last five years: Daesh atrocities against

religious minorities in Syria and Iraq, and the Burmese military's atrocities perpetrated against the Rohingya Muslims in Myanmar; both cases are classified as genocide, the crime of crimes. Third, I consider what basic responses are needed to address such atrocities and protect those targeted.

The article aims to scrutinize the approaches taken to address the recent atrocities and consider the need to strengthen the response genocide or crimes against humanity. Furthermore, it makes a clear case that any responses must address the nature of the atrocities, namely, the element of religion or belief.

PERSECUTION BASED ON RELIGION OR BELIEF AND GENOCIDE

Persecution, as defined in the Rome Statute, covers “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”¹ Conversely, religious persecution or persecution based on religion or belief² is not univocally defined in the Rome Statute as a subcategory and its definition and scope continue to be subject to debates.³ However, it is clear that it is included within the generic definition of persecution. And while persecution based on religion or belief may not be universally understood, there are certain acts that can be classified as such crimes including mass atrocities under international criminal law. For example, persecution can be classified as a crime against humanity, manifested by a wide range of acts falling under the definition of crimes against humanity in the Rome Statute;⁴ as genocide as

¹ Rome Statute of the International Criminal Court, Article 7(2)(g), UN Doc. A/CONF. 183/9, 17 July 1998, 2187 U.N.T.S. 90.

² The paper will use the term “persecution based on religion or belief” as the definition is considered to be inclusive.

³ See, e.g., Knox Thames et al, *International Religious Freedom Advocacy: A guide to Organizations, Law and NGO's* (Baylor University Press, 2009) 11-12; Charles L. Tieszen, ‘Towards redefining persecution’ (2008)1 *International Journal for Religious Freedom* 67-80; Charles L. Tieszen, *Re-examining religious persecution. Constructing a framework for understanding persecution* (AcadSA Publishing: Johannesburg, 2008).

⁴ Rome Statute, art. 7(1)(h).

defined in the UN Genocide Convention and the Rome Statute;⁵ and as war crimes under the Rome Statute.⁶ Indeed, the two cases discussed in this article, both of which have a clear religion or belief element, meet the legal definition of genocide. However, apart from these two cases of genocidal atrocities, there are many other examples of atrocities that can be classified as persecution based on religion or belief, whether as a crime against humanity or lower offenses. Some of the best examples include the situation of the Uighur Muslims and Falun Gong practitioners in China, the situation of Baha'is in Iran and Yemen, the situation of Ahmadis and Christians in Pakistan, and the list goes on.

While some forms of persecution based on religion or belief may be considered as deriving from religious protectionism (rather than targeting of the groups for annihilation), such religious protectionism cannot be justified with the existing international law standards and especially where it incorporates the use of violence. Religious protectionism involves favoring one religion and imposing limitations on other religions to create conditions for the preferred religion to flourish. Religious protectionism may involve state imposition of laws and policies that would further this goal. Religious protectionism may be reinforced by non-state actors, including civil society actors. Such religious protectionism often grows on the fear of the other or fear of the minority religions growing into the majority.

And while religious protectionism may be the motivating factor behind it, one has to differentiate “protective law and policies” and mass atrocities. Acts of violence require a clear line to be drawn. However, other acts of religious protectionism—including excessive limitations on the enjoyment by others (especially minority groups) of the right to freedom of religion or belief—even if not accompanied by acts of violence, constitute significant challenges and should not be justified. The following section considers two cases of mass atrocities based on religion or belief from the last five years only, which may be classified as cases of genocide.

THE DAESH GENOCIDE

In early 2014, a new terrorist group calling itself the Islamic State (Daesh, also known as ISIL, ISIS, and IS) began conquering territories in Syria and Iraq and proclaiming them as its *caliphate*.⁷ Daesh used the internal instability in both countries to further its goals. The terrorist group managed to gain unprecedented support in manpower, especially from international fighters (so-called foreign terrorist fighters) including over 3,700 from Germany, France, Belgium, and the UK.⁸

On August 3, 2014, Daesh launched a violent attack against the ethno-religious minority community of Yazidis in Sinjar, Iraq. Daesh fighters killed hundreds, if not thousands of men. The victims' mass graves continue to be discovered to this day.⁹ As part of the same campaign, Daesh fighters abducted boys to turn them into child soldiers and women and girls for sex slavery. In 2019, five years after their abduction, more than 3,000 women and girls are still missing. Over the subsequent days in early August 2014, Daesh attacked several villages in Nineveh Plains forcing over 120,000 Iraqi Christians, another religious minority group in Iraq, to flee their homes to the neighboring Kurdistan. Daesh fighters burned houses and churches and destroyed the infrastructure in the region. Daesh remained and controlled the area for approximately two years, with remnants controlling some areas for another two years.

Over the time of their reign in the area, Daesh fighters have committed murder, extermination, enslavement, deportation and forcible transfer of population, imprisonment, torture, abductions of women and children, exploitation, abuse, rape, sexual violence, forced marriage, enforced disappearance, and more. Daesh has specifically targeted Christians, Yazidis, and other religious minorities, including Muslim minorities, for destruction in an attempt to annihilate religious pluralism in the area and to establish a purely Islamic region.¹⁰ Hence, the atrocities committed by Daesh against religious minorities can be classified as genocide under international law, and have been recognized as such by the Council of Europe, European

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277; Rome Statute, art. 6.

⁶ Rome Statute, art. 8.

⁷ UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, “*They came to destroy*”: ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

⁸ *Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq*, SOUFAN GRP., (DEC., 2015), http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf.

⁹ *UN exhumes Yazidi mass graves from Islamic State massacre in northern Iraq*, FRANCE24 (APR. 13, 2019), <https://www.france24.com/en/20190413-un-yazidi-mass-grave-islamic-state-massacre-northern-iraq-kocho>

¹⁰ UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, “*They came to destroy*”: ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

Parliament, US Congress and the US Administration, the Dutch Government, UK House of Commons, and the Lithuanian, Canadian, Australian, French, Hungarian, and Austrian Parliaments.

THE GENOCIDE IN MYANMAR

The recent genocide in Myanmar refers to the atrocities perpetrated by the Burmese military against the ethno-religious Muslim minority group in Rakhine state, the Rohingyas. The situation of the Rohingya Muslims in Myanmar has been difficult for decades as a result of the Burmese Government not recognizing them as citizens and treating them as illegal immigrants.¹¹ However, the situation deteriorated rapidly after the events on October 9, 2016, when nine Burmese police officers were killed by an armed militia.¹² The response to the killings of the Burmese police officers was reportedly violent, leading to widespread and systematic indiscriminate attacks against Rohingya Muslim civilians. The events of October 2016 put Myanmar firmly onto the United Nations' radar with the UN Human Rights Council establishing a mechanism to consider the situation in Myanmar.

On February 3, 2017, the OHCHR Mission to Bangladesh released a report based on interviews with Rohingyas who fled Myanmar. The report was commissioned as a result of reports that over 66,000 Rohingyas had fled Myanmar to Bangladesh since October 9, 2016. The Mission interviewed 240 people who informed the preparation of the report, including 204 in-depth interviews. The Mission interviews identified:

Extrajudicial executions or other killings, including by random shooting; enforced disappearance and arbitrary detention; rape, including gang rape, and other forms of sexual violence; physical assault including beatings; torture, cruel, inhuman or degrading treatment or punishment; looting and occupation of property; destruction

of property; and ethnic and religious discrimination and persecution.¹³

The Mission raised its concerns that the atrocities perpetrated against the Rohingya Muslims amounted to "persecution against a particular ethnic and religious group." The report further indicated that as of January 20, 2017, over 22,000 Rohingyas remained internally displaced in Myanmar. The report suggested that crimes against humanity or even ethnic cleansing were taking place. Over the subsequent months, the number of forcibly displaced increased to over 700,000.¹⁴

Despite the fact that the situation of the Rohingya Muslims is dire and the group is arguably the most persecuted religious minority group in Myanmar, the situation of other religious minority groups requires attention. A 2018 Sky News investigation into the situation in Kachin state, a predominantly Christian region, revealed that Christian minority groups are also being subjected to mass atrocities at the hands of the Burmese military.¹⁵ Aside from the acts of violence perpetrated against religious minorities in Kachin state, the investigation claims that the Burmese government has been deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part. The investigation suggests that the Burmese government has been denying "aid agencies, international observers, foreign diplomats and politicians' access to the state,"¹⁶ namely actors that could assist the people living there. This situation in Kachin state is not a recent development. Indeed, the conflict between Kachin Independence Army and the Burmese Army has continued since approximately 2011, having an adverse effect on the situation of all in Kachin and having resulted in over 100,000 people being internally displaced. The conflict followed several reports of the use of rape and sexual violence as a weapon of war, which has not been adequately investigated and prosecuted.

¹¹ David Dapice, *A Fatal Distraction from Federalism: Religious Conflict in Rakhine*, HARVARD KENNEDY SCHOOL, ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION (JUNE 2015), https://ash.harvard.edu/files/a_fatal_distraction_from_federalism_religious_conflict_in_rakhine_10-20-2014_rev_6-26-15.pdf

¹² Reuters, *Myanmar says nine police killed by insurgents on Bangladesh border*, THE GUARDIAN (OCT. 10, 2016), <https://www.theguardian.com/world/2016/oct/10/myanmar-nine-police-killed-insurgents-bangladesh-border>.

¹³ Office of the High Commissioner for Human Rights, Report of OHCHR mission to Bangladesh, *Interviews with Rohingyas fleeing from Myanmar since 9 October 2016* (3 February 2017), www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf.

¹⁴ International Criminal Court, Office of the Prosecutor, *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18-1 (April 9, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF.

¹⁵ Alex Crawford, *Uncovered: 'Worrying evidence' of new genocidal campaign on Kachin Christian minority in Myanmar*, SKY NEWS (JUNE 5, 2018), <https://news.sky.com/story/uncovered-worrying-evidence-of-new-genocidal-campaign-in-myanmar-11395173>.

¹⁶ *Id.*

Acts of discrimination or persecution against Christians in Myanmar are also common in other states, for example, Chin and Karen. Chin, despite being a predominantly Christian state with over 90% of Christian population, has seen acts of forced conversions to Buddhism, disruptions of religious gatherings and services, denial of building permits for places of worship, destruction and removals of crosses, burdensome bureaucracy for religious gatherings, and many more. Christians in Karen state have been targeted by the Burmese army and have been subjected to forced labor, abuse and killings.

RESPONDING TO PERSECUTION BASED ON RELIGION OR BELIEF

The above-discussed cases of genocide perpetrated based on religion or belief cannot be ignored. The response needed is one that is comprehensive and reflective of the present and future challenges that the persecuted communities may face. This section discusses the approaches taken to address the persecution faced by the communities targeted for annihilation. However, the approaches could be strengthened and adopted to address other cases of persecution based on religion or belief as well.

Putting a stop to atrocities

Where the atrocities are ongoing, it is crucial to stop them and protect those targeted. While the primary responsibility towards the members of the persecuted communities lies with the state, where it fails to take responsibility (or indeed, is responsible for or complicit in the acts), the international community must act. And especially, states that are parties to the UN Genocide Convention have the duty to prevent such atrocities whenever and wherever they occur and punish the perpetrators, but also protect the communities on the verge of annihilation.

In the case of the Daesh genocide, after the countries where the atrocities were perpetrated were not able to stop the atrocities and protect their people, the international community stepped up its efforts. The established Global Coalition against Daesh, a coalition of over 78 partners, supported the local forces to recover the territories from Daesh. This territorial win against Daesh does not change the fact that the perverted ideology of Daesh continues to rage on. This means a continued risk of the terror organization regrouping. And indeed, according to

a recent Pentagon report, the threat of Daesh resurfaces in Iraq and Syria. According to the report, “Despite losing its territorial ‘caliphate,’ Daesh solidified its insurgent capabilities in Iraq and was resurging in Syria this quarter.”¹⁷ This is not an unexpected development, as the territorial defeat does not mean the defeat of the ideology that gave rise to the Daesh campaign of terror.

The case of the Burmese military’s atrocities against the Rohingya Muslims, despite draping the media attention, has not gained the same level of attention and international response. Respecting the principle of state sovereignty, states and international actors limit their involvement to diplomatic dialogue that has not brought any palpable solution.

Humanitarian assistance

The survivors of such atrocities require a wide range of assistance to address their short and long-term needs, including medical aid, humanitarian assistance, and help with homes, businesses, and infrastructure in the regions destroyed. In many cases, and especially in those discussed above, the assistance required by the victims and survivors equates to rebuilding all aspects of their lives and placing protections to ensure that such atrocities will never happen again.

In Iraq, in response to the Daesh genocide targeting religious minorities, several actors have been funding numerous projects aimed at assisting the victims and survivors with their daily needs, rebuilding the villages, and assisting those who wish to return to their homes (including ensuring their employment prospects, helping with resilience). Among others, the US, Poland, and Hungary engage in projects that directly support the communities, rather than going through the established UN mechanisms. Similarly, non-governmental organizations like Aid to the Church in Need and Yazda provide direct assistance to the effected communities.

During the first Ministerial to Advance Religious Freedom in July 2018, US Vice President Pence announced the establishment of the Genocide Recovery and Persecution Response program. Over the course of last year, the program has introduced various projects aimed at helping those affected by Daesh, for example, establishing employment opportunities, or helping women to build up their confidence and resilience after experiencing rape and sexual violence. Furthermore, at the second Ministerial to Advance Religious Freedom (in July 2019), the US Agency for International

¹⁷ LEAD INSPECTOR GENERAL REPORT TO THE US CONGRESS, OPERATION INHERENT RESOLVE, 2019, https://media.defense.gov/2019/Aug/06/2002167167/-1/-1/1/Q3FY2019_LEADIG_OIR_REPORT.PDF.

Development announced new humanitarian aid for Iraqi religious minorities consisting of an additional \$27 million in humanitarian assistance for ethnic and religious minorities in the Nineveh Plains and Western Nineveh Province. This brings the total US assistance for persecuted ethnic and religious minorities in Iraq to \$373 million (since Fiscal Year 2017).

Poland is very clear that it wants to provide assistance on the ground and in doing so, respect the culture, religion, and background of any individual that requires help. Poland has been providing this aid to all independently of their religion or belief, with a particular focus on minorities persecuted for their religion by Daesh, namely Yazidis and Christians. Among others, Poland is funding humanitarian aid that is being distributed in Iraq via the charity EagleWatch. Poland is also funding several projects that aim to ensure that people can engage in meaningful employment and be self-sufficient. For example, one of the projects in Sinjar assists in building farms for locals. Another project helps to create new jobs in small trade and local craft to give people a possibility of resuming their professional lives that were frozen since Daesh's attack in 2014. As explained by Minister Michal Wos at the Ministerial to Advance Religious Freedom, Poland is working to ensure that the communities are resilient and independent from external assistance.

Another substantial donor is the new Hungarian initiative, Hungary Helps, which has been providing significant assistance to persecuted Christians (although they have been expanding the scope of their assistance to also include Yazidis, and hope to provide aid to the Rohingya Muslims displaced to Bangladesh). Similar to Poland, Hungary provides humanitarian aid directly to the affected communities, cutting out any unnecessary intermediaries. Hungary Helps has been providing humanitarian assistance to the communities targeted by Daesh and funding to rebuild villages in the Nineveh Plains. In addition, Hungary Helps provides assistance to the persecuted, including a scholarship to students from these persecuted communities to continue their education in Hungary.

The situation is more complicated in Syria and Myanmar. As the Syrian Civil War still rages on, reaching all those people in need is very challenging. In Myanmar, those over 700,000 people who have sought refuge in Bangladesh are assisted in refugee camps. However, there are also people who, after being forcibly displaced, did not find such assistance. Furthermore, while the world observes the situation in Myanmar, the atrocities continue.

Legal steps

The perpetrators must be prosecuted for their atrocities, whether as genocide, crimes against humanity, and war crimes, or as murder, manslaughter, torture, battery, rape, slavery, and more. This is the primary way to ensure that the survivors and the families of the victims will see some justice being done. Also, such prosecutions may assist with prevention of similar future crimes by way of deterrence. The ever-growing atmosphere of impunity will not be able to achieve this.

Nonetheless, almost five years after the atrocities, only some Daesh fighters have been prosecuted for terrorism-related offences and none have been prosecuted for genocidal atrocities. The effort to bring Daesh to justice for genocide or other international crimes is underway, thanks to UN Security Council resolution 2379 es-

tablishing an Investigative Team to collect evidence of Daesh atrocities in Iraq.¹⁸ However, the initiative is still years away from achieving anything remotely close to what could be perceived as justice for the victims, and at this stage, it is not clear how the collected evidence will be used, when, and by whom.

Again, the situation in Syria is more complex and considering the current atmosphere at the UN Security Council, it is unlikely that it will establish any mechanism that would help to prosecute the Daesh fighters for their crimes in Syria.

The atrocities perpetrated in Myanmar are currently being looked at by the International Criminal Court after the Pre-Trial Chambers confirmed that the ICC has the jurisdiction to consider the issue of forced

In many cases, ... the assistance required by the victims and survivors equates to rebuilding all aspects of their lives and placing protections to ensure that such atrocities will never happen again.

¹⁸ S. C. Res. 2379 (2017).

displacement of the Rohingyas from Myanmar (a non-party to the Rome Statute) to Bangladesh (a party to the Rome Statute).¹⁹ This proactive move allowed the ICC to overcome the ever-present reluctance at the UN Security Council to refer the situation to the ICC.

Ensuring safety and security

The survivors of genocidal atrocities need to be provided with adequate security to be able to remain in the region where once they faced annihilation (if they choose to do so). If they are not able to stay in the region (or indeed they do not have faith in their future in the region), it is crucial that steps are taken to ensure that they find a safe haven somewhere else. Understandably, as we have been witnessing one of the worst migration crises since World War II, the capacities of states to invite refugees may be significantly affected. It is crucial to consider how best to assist victims of genocide that face certain death if they remain in their home countries.

Protecting the rights of all

Lastly, it is crucial to ensure that we stand up for the right of freedom of religion or belief and other human rights of all. The response to such atrocities must be also mindful of the religion- or belief-targeting nature of the atrocities. The questions that need to be asked are, among others, what were the main challenges faced by the targeted individuals and communities prior to the atrocities, including acts of discrimination and persecution; whether their rights were adequately protected and enforced; and if not, what were the shortfalls and how could they be addressed moving forward.

British Minister of State for the Foreign and Commonwealth Office, Lord Ahmad recently emphasized that “our biggest challenge is not when we stand up for our own rights and beliefs. The real test is when we stand up for the rights and beliefs of others.” This important message was part of his speech to mark the International Day Commemorating the Victims of Acts of Violence Based on Religion or Belief at the U.K. House of Lords. And indeed, our Christian values and

worldview call us to care for and extend our assistance to everyone in need and not only those who are Christian. This is because every human life is created in the image of God, in dignity and values. Religious protectionism cannot be accepted considering the current international legal standards and the fact that such protectionism results in limitations (at a minimum) of the rights of others.

CONCLUSION

When a group is targeted for annihilation, we cannot close a blind eye and shy away from taking steps to provide assistance, whatever assistance is needed. This is not the Christian way. This is not a human way. We can do better than this. Helping those in need is a Christian value, and a human value too. Whatever our background, we cannot forget those in need. And indeed, there will always be people around us who will require some form of help. However, it must be considered that in the case of genocide there is a risk that the targeted community may disappear from the region or the earth. This is a risk that humanity cannot take.

Caring for others requires us to extend our helping hand to all in need, independently of their religious affiliation or their background. We must stand for the rights of others. This is the true test for our Christian values and our humanity.

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¹⁹ International Criminal Court, The Presidency of the International Criminal Court, *Decision on the constitution of Pre-Trial Chamber III and on the assignment of the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-1 (June 25, 2019), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/19-1>.

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THE INDEPENDENCE OF JUDICIAL CONSCIENCE

BY BARRY W. BUSSEY

In the fall of 2018, by means of written questions, Senator Mazie Hirono challenged Nebraska District Court judge nominee Brian Buescher's suitability for the bench because he belonged to a Catholic fraternal order, the Knights of Columbus.¹ Hirono claimed that the Knights have "extreme positions," such as belief in traditional marriage, and asked Buescher, "If confirmed, do you intend to end your membership with this organization to avoid any appearance of bias?"² Similarly, Senator Kamala Harris in her questioning of Buescher objected to the fact that "the Knights of Columbus, an all-male society comprised of primarily Catholic men...opposes a woman's right to choose."³ Buescher responded to these concerns by asserting that he would abide by the judicial oath and would remain faithful to US law.⁴

Meanwhile, a recent political drama in Canada exposed similar pressures on the judiciary when Prime Minister Trudeau fired his Attorney General, Jody Wilson-Raybould. Among other concerns, the Prime Minister apparently questioned Wilson-Raybould's judgement in recommending Chief Justice Glenn Joyal of the Manitoba Court of Queen's Bench as a replacement for retiring Chief Justice Beverley McLachlin of the Supreme Court of Canada.⁵ Joyal CJ had expressed

concerns over the Supreme Court's liberal interpretations of the *Canadian Charter of Rights and Freedoms*, and had given a speech against judicial activism; hence, the Prime Minister was evidently concerned that Joyal CJ might not support LGBTQ2 rights or abortion.⁶ In other words, Joyal had the wrong opinions.⁷

These controversies highlight a fascination with the personal and moral opinions of those who hold judicial office. Competence and character are no longer the sole criteria for evaluating a judicial nominee; candidates face a climate which demands they have the "correct" moral opinions on fundamental human rights issues. Those issues include abortion, marriage, and the euphemistically-termed Medical Assistance in Dying (MAiD).

Given the importance of the judicial role, the stakes are high, so it is not without some trepidation that I wade into these turbulent waters. After all, a judge embodies, in one person, all that defines a liberal democratic state. This is a person who is called upon not only to efficiently make complex decisions but to do so competently and fairly. The judge represents impartiality—the view that both the plaintiff and the defendant, the prosecutor and the accused, will have a fair, unbiased arbiter who can neither be bought nor sold but has the courage to make the right and proper decision.

¹ It is worth noting that the Knights of Columbus contribute hundreds of millions of dollars and volunteer hours to humanitarian and community-oriented projects around the globe, including disaster and war relief, scholarships, and food programs—none of which were mentioned by the senators.

² NOMINATION OF BRIAN BUESCHER TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, QUESTIONS FOR THE RECORD DECEMBER 5, 2018, <https://www.judiciary.senate.gov/imo/media/doc/Buescher%20Responses%20to%20QFRs.pdf>. See also STEVE CORTES, *ANTI-CATHOLIC SENATORS, REAL CLEAR POLITICS* (DECEMBER 26, 2018), https://www.realclearpolitics.com/articles/2018/12/26/anti-catholic_senators_139012.html.

³ *Id.*

⁴ *Id.*

⁵ Joan Bryden, "This is wrong": ex-Supreme Court candidate says his candidacy is being used to further an agenda, *THE CANADIAN PRESS* (MARCH 25, 2019), <https://globalnews.ca/news/5094485/wilson-raybould-trudeau-glenn-joyal/>.

⁶ *Id.*

⁷ The Trinity Western University law school case exemplified the same fear of lawyers and judges having unpopular opinions on fundamental human life issues. Heather Burchill, Deputy Judge Advocate for the Canadian Forces, argued that in light of the University's religious views, "accepting Trinity's application would strike a blow to the heart of our profession" (email to René Gallant in NOVA SCOTIA BARRISTERS' SOCIETY, TRINITY WESTERN UNIVERSITY SUBMISSIONS (2014), 13, http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-10_ExecPkg_TWU_Submissions.pdf).

The judge is the agent through which the wisdom of the ages, as contained in the law, is applied to the present dispute she adjudicates. We trust her to hold a deep reverence for the sacrifice previous generations made to uphold truth and the rule of law. As a competent judicial guardian operating in the sphere of liberty, she and her colleagues earn our respect. With such esteem blowing in the sails of the ship of state, we collectively glide into the smooth waters of the harbors of peace and prosperity.

Hence, it is no small matter to restrict or compromise the judicial conscience. Indeed, I contend that upholding the judicial conscience is a democratic imperative, essential to respecting the individual dignity of the judge, and to maintaining the fundamental rights and freedoms that distinguish a liberal democracy from a dictatorship.

I define “judicial conscience” as the personal commitment of a judge to moral integrity—an integrity that has both an internal and an external sphere. The internal sphere addresses a judge’s personal commitment to what she believes, including any obligation to manifest those beliefs in private or public. Within the internal sphere, the judge regulates her personal relationships and commitments. The external sphere of the judicial conscience regulates her public relationships and the obligations that are imposed on her by the state. This involves her faithfulness to the duties that she undertook when she was appointed (or elected) to serve the state. Here she upholds the highest ethical traditions of her office, ensuring that the rule of law, with all its complexity, is followed faithfully for the benefit of the entire community.

For the purposes of this article, I am concerned less with the external sphere of judicial responsibility in deciding cases, and more with the internal sphere of conscience which may be violated when the state imposes on a judge through ceremonial functions outside the courtroom. There are any number of requests that may be made of a judge that may cause personal consternation. A Sabbatarian judge may be asked to attend a military parade on day of worship; a Muslim judge may be required to remove her head scarf. Another judge may be asked to perform a marriage that would be against his religious conscience.⁸

Given the political sensitivity of the issues at play, I am particularly interested in that latter example, where a judge may be asked to perform a marriage in violation of his religious convictions. The question is not merely abstract; there are several high-profile cases in the United States of judges refusing to marry same-sex partners. As a result, on February 14, 2019, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 485, subtitled “Judges Performing Same-Sex Marriages.”⁹ The opinion states that a judge who is performing marriages may not refuse to perform the marriage of a “same-sex” couple.¹⁰ Whether performing marriages is a mandatory or discretionary duty, the judge is prohibited from discriminating between couples.¹¹

IN FAVOUR OF ACCOMMODATING A JUDGE

Accommodating religious conscience was, until recently, the default position in Canadian law. Indeed, when affirming the right of a Sikh student to wear his ceremonial dagger, or kirpan, to school, the Supreme Court insisted that “[r]eligious tolerance is a very important value of Canadian society”—one which lies “at the very foundation of our democracy.”¹² Likewise, former Chief Justice Dickson stated emphatically:

It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection. It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.¹³

Of course, the very concepts that Chief Justice Dickson associates with democracy—dignity, individual conscience, and freedom—are predicated on a uniquely Judeo-Christian worldview. Philosopher Jürgen Habermas makes this connection clear when he

⁸ Often, this debate centers on a religious objection to same-sex marriage, but there are other possibilities. For example, within certain faith traditions, a celebrant who marries those who are “unequally yoked” would be morally culpable of uniting a couple against the teachings of Christ.

⁹ ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 485 (2019), https://www.americanbar.org/content/dam/aba/images/news/2019/02/formal_op_485.pdf.

¹⁰ *Id.*

¹¹ See Dennis Rendleman, *The wall between church and judiciary*, ETHICS IN VIEW (MARCH 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/the-wall-between-church-and-judiciary/>

¹² *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 para. 76 (Can.).

¹³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 paras. 121-122 (Can.).

insists that Christianity is the normative force in modern self-understanding and more than a mere precursor or a catalyst.¹⁴ Egalitarian universalism and ideas of freedom, individual rights, human rights, and democracy directly flow from the Judaic ethic of justice and the Christian ethic of love.¹⁵

In addition to this long heritage of respect for religion, the Supreme Court's decision in *Reference re: Same-Sex Marriage* provides explicitly for the accommodation of religious clergy.¹⁶ The Supreme Court recognized that the state could not force members of the clergy to solemnize marriages that were in violation of their conscience. Crucially, for the purposes of performing marriages, clergy are state actors. Hence, it may be possible to analogize this decision to the accommodation of judges, on the basis that "individual conscience and individual judgment also [lie] at the heart of our democratic political tradition."

However, this argument has been weakened by an increasingly strident revolution against the accommodation of religion, about which I have written extensively elsewhere.¹⁷ This growing reluctance to accommodate matters of belief and conscience is, I suggest, a significant change in liberal democracies.

AGAINST ACCOMMODATING A JUDGE

Arguments against accommodating the conscientious judge include claims of dignitary harm to sexual minorities. This is vividly expressed in the Saskatchewan Court of Appeal's (SCA) Marriage Commissioners decision,¹⁸ in which the SCA ruled that legislation permitting exemptions for marriage commissioners would violate the *Canadian Charter of Rights and Freedoms*. The SCA insisted that "allowing marriage commissioners to deny

services to gay and lesbian couples would have genuinely harmful impacts" and would "perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome."¹⁹ The court suggested "negative effects" would "ripple through friends and families...[to] the public as a whole."²⁰ Worse, any exemptions

would undermine a deeply entrenched and fundamentally important aspect of our system of government. In our tradition, the apparatus of the state serves everyone equally without providing better, poorer or different services to one individual compared to another by making distinctions on the basis of factors like race, religion or gender. The proud tradition of individual public officeholders is very much imbued with this notion. Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs. Any idea of this sort would sit uneasily with the principle of the rule of law... Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only.²¹

Ironically, the very notion that every citizen should be served equally is rooted in a distinctly Judeo-Christian conception of individual human worth, which ascribes dignity on the basis that each human being is made in the image of God.²² However, far from acknowledging the profound and positive influence of religion on Canadian law, this case echoes a common refrain among the elites

¹⁴ JÜRGEN HABERMAS, *TIME OF TRANSITIONS* (CIARAN CRONIN AND MAX PENSKY, EDS. AND TRANS.) 150-51 (2006).

¹⁵ *Id.*

¹⁶ *Reference re: Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.).

¹⁷ Barry W. Bussey, *The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School*, 2016 BYU L. REV. 1127 (2017), <https://ssrn.com/abstract=2951912>.

¹⁸ *Marriage Commissioners Appointed Under The Marriage Act (Re)*, [2011] SKCA 3 (Can.).

¹⁹ *Id.* at paras. 94-95.

²⁰ *Id.* at para. 96.

²¹ *Id.* at paras. 97-98.

²² See, e.g., *Galatians* 3:28. Jeremy Waldron elaborates on the idea of dignity as a matter of status. For Waldron, human dignity is not merely an egalitarian idea; it has become "nobility for the common man." Waldron describes this as a "transvaluation," in which the historical association of dignity with noble birth and high office has been reworked and reassigned rather than merely superseded. There has been a "levelling-up" of the bearers of dignity. See WALDRON, *DIGNITY, RANK, AND RIGHTS* 22 (2012).

who oppose religious accommodation.²³ Notice Justice Richards's declaration that "[p]ersons who voluntarily choose to assume an office, like that of marriage commissioner [or, we might add, a judge], cannot expect to... make it conform with their personal religious or other beliefs." In other words, those who refuse to accept changing moral norms should be excluded from professions such as medicine, law, or politics.

Consider the ramifications of such a position. Are all state actors to be mere automatons with no recognition or respect for their internal sphere of conscience? Should soldiers be expected to shoot indiscriminately at whatever target the state declares the enemy? Should educators be forced to teach whatever curriculum the state deems acceptable, regardless of their own, deeply held beliefs?²⁴ What of their ability to wear religious symbols such as a yarmulke or hijab?²⁵

Under this rubric of conformity, religious freedom is subtly but inexorably eroded: first, religion is increasingly characterized as a matter of private belief, which ought not to be "imposed" on anyone; then even private beliefs are deemed objectionable, such that they can and should be set aside in favor of state dictates.

The new blasphemy, then, is not religious heresy, but holding the "wrong" beliefs or opinions, particularly when it comes to identity politics. It seems to me that we are rapidly approaching a reality where there is a constitutional right not to be offended. Anyone who takes offense when confronted with dissonant opinions can demand the state exact punishment. This is clearly becoming untenable for the long-term future of freedom.

CONCLUSION: IMPLICATIONS

Professor Hans-Martien ten Napel contends that Christian presuppositions made liberal democracy possible.²⁶ He argues that "no legitimate liberal democracy

is feasible without there being the type of protection of religious freedom offered by the right to freedom of religion or belief as it has historically developed."²⁷ He explains that there are three principles of liberal democracies which interconnect: constitutionalism, democracy, and religious freedom. The interconnectedness allows citizens to become "fully human." From ten Napel's perspective, to be fully human includes both the individual and communal aspects of human existence, which are found in freedom of religion or belief.²⁸

Thus, to disregard the judicial conscience is to compromise the dignity of the judge, the worth of her convictions, the fullness of her humanity. Even more, it undermines the very essence of what distinguishes a democratic society characterized by diversity, inclusion, and freedom.

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²³ For instance, in a case involving physicians who objected to giving "effective referrals" for certain medical procedures such as MAiD, the Ontario Court of Appeal asserted that "the appellants have no common law, proprietary or constitutional right to practice medicine. As members of a regulated and publicly-funded profession, they are subject to requirements that focus on the public interest, rather than their interests" (Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, [2019] ONCA 393 para. 187).

²⁴ Regimes on both ends of the political spectrum have been guilty of literally rewriting history to suit their partisan agendas; the excesses of the twentieth century clearly warn that allowing the state full sway is not a good thing.

²⁵ This illustration is of immediate relevance to religious teachers in Quebec, who are now subject to recently passed legislation that prohibits any public official from wearing religious garb.

²⁶ HANS-MARTIEN TEN NAPEL, CONSTITUTIONALISM, DEMOCRACY AND RELIGIOUS FREEDOM: TO BE FULLY HUMAN 56-59 (2017).

²⁷ *Id.* at 7.

²⁸ See *id.* at 95, 113, 114.

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